IN THE

Supreme Court of the United States

October Term, 1972

No. 72-851

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 9, 1972
CERTIORARI GRANTED JUNE 4, 1973

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.
(5980)

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IN THE

United States Court of Appeals

For the Second Circuit [A]

No.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs-Appellants,

vs.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil No. 70-CV-35

DOCKET ENTRIES.

I-N-D-E-X

Docket Entries.

COMPLAINT, Filed 2-5-70.

UNITED STATES DISTRICT COURT [1]
NORTHERN DISTRICT OF NEW YORK

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants.

Civil Action No. 70-CV-35

Plaintiffs, for their complaint against defendants, allege and show that:

1. Plaintiff, THE ONEIDA INDIAN NATION OF NEW YORK STATE, is an Indian Nation or Tribe with its principal Reservation and situs in the Counties of Oneida and Madison, State of New York. Plaintiff, THE ONEIDA INDIAN NATION OF WISCONSIN, is an incorporated Indian Nation or Tribe with its principal Reservation and situs in the State of Wisconsin. Defendants are Counties of the State of New York.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. Jurisdiction is conferred by diversity of citizenship.

3. From time immemorial, down to the time of the American Revolutionary War, the plaintiffs owned some 6,000,000 acres of land in New York State, as shown on the map annexed as Exhibit A. In the American Revolutionary War, the plaintiffs fought on the side of the Thirteen Colonies and rendered valuable and material support, which helped the Colonies attain victory and independence.

4. The Congress of the United States was empowered to regulate commerce with the Indian Tribes under Article

IX of the Articles of Confederation and under Article L, Section 8, of the United States Constitution. Under this power, treaties were made [2]

with the Oneidas, which read in part as follows:

Treaty with Six Nations - Ft. Stanwix 1784

> "Article 2. The Oneida and Tuscarora Nations shall be secured in the possession of lands on which they are settled."

Treaty with Six Nations - Ft. Harmar 1789

> "Article 3. The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

Treaty with Six Nations - Canandaigua 1794

> "Article 2. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."
>
> "Article 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree that for injuries done by individuals on either side no private revenge or retaliation shall take place, but instead complaint shall be made by the party injured to the other: by the Six Nations or any of them to the President of the United States. . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken . . ."

Treaty with Oneida, Tuscarora and Stockbridge Indians - Oneida 1974

> "Whereas, In the late war between Great Britain and the United States of America, a body of the Oneida and Tuscarora and Stockbridge Indians adhered faithfully to the United States and assisted them with their warriors, . . . and as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them . . ." (Here followed promises to erect a sawmill and other improvements on the Reservation and to compensate the Oneidas for damages suffered in the War.)

5. To implement their treaty obligations to the Oneidas and other Indians, the United States enacted in 1790 what is now Section 177 of the Federal Indian Law, 25 U.S.C.A. The meaning of the protection promised in these treaties was explained by President George Washington to a delegation of Senecas on December 29, 1790. Interpreting the 1784 treaty he said:

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> "Here, then, is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.
>
> "Here well and let it be heard by every person in your nation, that the President of the United States declares, that the General Government consideres itself bound to protect you in all the lands secured to you by the treaty of Fort Stanwix, the 22d day of October, 1784, excepting such parts as you may since have fairly sold, to persons properly authorized to purchase of You."

Thus, the United States by formal treaties, the supreme law of the land, and George Washington, our first President, have given their sacred word and promise:

> "The General Government will never consent to your being defrauded, but it will protect you in all your just rights."

6. Plaintiffs hereby invoke Section 177 of the Federal Law, Title 25 U.S. Code, which reads as follows:

> "Section 177. Purchases or Grants of lands from Indians
>
> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claims to land within such State, which shall be extinguished by treaty. R.S. Section 2116."

7. Plaintiffs hereby invoke Section 194 of the Federal Indian Law, Title 25 U.S. Code, which reads as follows:

> "Section 194. Trial of right of property; burden of proof

their land and induced them to sell it for an unconscionable and inadequate price.

17. New York State also knew and admitted that federal law forbade such land acquisitions, since it recognized the need for U.S. consent in connection with a further land purchase from plaintiffs in 1798 and in connection with four other acquisitions of Indian lands from 1797-1802.

18. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded became the property of the Counties

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of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of said occupancy plaintiffs have been denied use of such parts of the premises and have been damaged to the extent of at least $10,000, exclusive of costs and interest.

19. By bringing this action, plaintiffs do not waive or relinquish any right or action in respect of its lands in New York State as shown on Exhibit A.

20. Both the federal and state treaties provide that the Oneida Indians are to ask the help of the United States and the State before taking any action on their own. The plaintiffs have asked the help of both the federal and state governments and such help has been refused.

21. It has always been the policy of the Oneida Indians to live in peace and trust and friendship with their neighbors. The plaintiffs bring this action against defendants only because all other avenues of redress have been closed to them.

Wherefore, plaintiffs damand judgment against defendants in the sum of at least TEN THOUSAND DOLLARS

($10,000.00), plus such other and further monetary damages as the Court may deem just.

BOND, SCHOENECK & KING

By _____

Attorneys for Plaintiffs
Office and P.O. Address
1000 State Tower Building
Syracuse, New York 13202
Telephone (315) 422-0121

Exhibit A — Map annexed to Complaint.

[7]

Exhibit B — Treaty of 1788 annexed to Complaint.

Fort Stanw[illegible]

STATE TREATY WITH THE ONEIDA INDIANS, 1788.

At a treaty held at Fort Schuyler, formerly called Fort Stanwix, in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indians called the Oneidas — it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

First, The Oneidas do cede and grant all their lands to the people of the State of New York forever.

Secondly. Of the said ceded lands the following tract to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly bounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner of the last mentioned tract; thence due south until it intersects a due west line from the head of the Tinnaderha or Unadilla River; thence from the said point of intercession due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Canesernge Creek, and thence along the said Creek the Oneida Lake and the Wood Creek to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved lands, and four miles distant from the said Southern line, the Oneidas shall hold to themselves and their posterity forever for their own use and cultivation, but not to be sold, leased or in any other manner aliened or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their rights so to make leases and to prevent

Exhibit B – Treaty of 1788 annexed to Complaint.

frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of the State of New York one half mile square at the distance of every six miles of the lands along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and the Oneida Lake as they shall elect and may take and appropriate for such works or buildings lands to the extent of one square mile at each place; and further notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indians (now settled at Brothertown under the pastoral care of the Rev. Samson Occom) and their posterity forever, and the Stockbridge indians and their posterity forever are to enjoy their settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indians, and a tract of six miles square for the Stockbridge Indians.

Thirdly. In consideration of the said Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollers in provisions; and also five hundred dollars in money to be applied towards building a grist mill and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever on the first day of June in every year at Fort Schuyler aforesaid six hundred dollars in silver; but if the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollars shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid; and as a

Exhibit B - Treaty of 1788 annexed to Complaint.

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further consideration to the Oneidas the people of the State of New York shall grant to the said John Francis Perache a tract of land, Beginning in the line of property at a certain cedar tree near the road leading to Oneida and runs from the said cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache hath consented to accept from the Oneidas in satisfaction for an injury done to him by one of their Nation. And further, the lands intended by the Oneidas for John T. Kirkland and for George W. Kirkland, being now appropriated to the use of the Oneidas, the people of the State of New York shall therefore, by a grant of other lands make compensation to the said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from the Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the said ceded lands lying to the northward of the Oneida Lake a tract of ten miles square, wherever he shall elect the same.

Fourthly. The people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, from residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation. and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said State for the time being. And further, the Oneidas and their posterity forever shall at the request of the Governor of the said State be aiding to the people of the State of New York in removing all such intruders, and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice.

In testimony thereof as well the sachems, chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation, as the said Governor and other commissioners of the People of the State of New York, have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

ODAGHSEGHTE
KANAGHGWEYA

Exhibit B – Treaty of 1788 annexed to Complaint.

[11]

PETER OTSIQUETTE
THAGHNIYONGO
THONIGWEAGHSHALE
TEHEAND'YAKHON
OGISTALALE *alias* HANYURRY
OTSETOGON
TEYOHAGWEANDA
ONEYANHA *alias* BEECH TREE
THAGHNEGHTOLIS *alias* HENDRICK
S' HONOUGHLEYO *alias* ANTGONY
THAGTAGHGUISEA
HANAGHSALILGH
GAGHSAWEDA
TYAGHSWEANGALOLIS *alias* DOMINE PETER
JOHEGHSLISHEA *alias* DANIEL
THANIGEANDAGAYON
ALAWISTONIS *alias* BLACKSMITH
KEANYARO *alias* DAVID
KAKIKTOTON
SAGOYONTHA
HANNAH SODOLK
TEHOUGHNIHALK HANWAGALET
KASKONGHGWEA KANWAGALET
HONONWAYELE
SKENONDONGH
GEORGE CLINTON
WM. FLOYD
EZRA L'HOMMEDIEU
RICHARD VARICK
SAMUEL JONES
EGBERT BENSON
PETER GANSEVOORT, JUNR.

(The Indians all signed this instrument by making their mark, a cross, at the end of their names, which had been written for them.)
Witnesses present.

Exhibit B – Treaty of 1788 annexed to Complaint.

The words (and the Stockbridge indians and their posterity forever) after the third word in the last line of the second article, and also the words (for the New England Indians and a tract of six miles square for the Stockbridge Indians) at the end of the same line and also the words (two thousand dollars in money) in the first line of the third article, and the words (except the lands whereof the Oneidas may make leases as aforesaid) in the third line of the fourth article being first interlined.

Before the execution hereof the Oneidas in Public Council declared to the Commissioners that they had in return for his frequent good offices to them given to John I. Bleecker of the lands reserved for their own use, one mile Square adjoining to the lands of James Dean and requested that the same might be granted and confirmed to him by the State.

SAML. KIRKLAND,
Miss'y & Interpreter.
J. B. CHRS. DEST,
Trys.
ABM. ROSEKRANTZ,
SIMEON DeWITT,
Survr. Genl.,
SAMUEL LATHAM MITHCELL,
JOHN TAYLER,
WM. COLBRATH.

Know all Men by these presents that We the Sachems Warriors and Women of the Oneida Nation of Indians in full Council assembled Have nominated constituted and appointed and by these presents Do nominate constitute and appoint Our Brothers of the said nation Peter Hanoughgwinya John Shawondo, Martinus Atshinha, Paul Otshetogon of the Wolf Clan, Anthony Shononghriyo William Taghtaghgivijere John Onontiyo Thomas Tehohearitha of the Turtle Clan and Joseph Ogeaghratarighahea Nicholas Sagovakarongo Nicholas Tehotskarion and Kanyoton of the Bear Clan Our lawful deputies and attornies for us and in Our name and in our behalf to treat with the Commissioners appointed by an act of the Legislature of the State of New York entitled "an act for the better support of the Oneida Onondago and Cayuga Indians and other purposes therein mentioned" and to bargain sell release and confirm unto the People of the said State all our right title interest Claim and demand whatsoever of in and to such part or parts of the lands within said State

Exhibit C — Treaty of 1795 annexed to Complaint

[13]

This Indenture made the fifteenth day of September One thousand seven hundred and ninety five Between the Sachems, Warriors and Women of the Oneida Nation of Indians by Jacob Reed, Peter Bread, Thomas Whitebeans & others whose names are hereunto subscribed as Deputies and attornies authorized and empowered for that purpose by a certain Instrument in writing under the hands and seals of said Sachems, Warriors and Women of the said Nation bearing date the first day of September instant of the first part and Philip Schuyler, John Cantine and David Brooks Agents in behalf of the people of the State of New York duly authorized and empowered by an act of the Legislature of the said State passed the 9th day of April, 1795 of the second part:

WHEREAS at a Treaty held at Fort Schuyler in the County of Herkimer on the twenty second day of September One thousand seven hundred and eighty eight between the said parties of the first part and certain commissioners duly authorized and empowered in behalf of the State aforesaid, certain Tracts of Land in the said Treaty particularly specified and described were appropriated and set apart for the use, benefit and behoof of the aforesaid Tribe or Nation of Indians, and

WHEREAS the said Tribe or Nation of Indians have requested of the Legislature of the said State to render a part of the Lands so appropriated and set apart productive of an annual income to them. Now Therefore this Indenture Witnesseth That the said parties of the first part for and in consideration of the sums of money and other stipulations hereinafter mentioned to be paid done and performed by and on the part of the said people of the State aforesaid Have granted, bargained, sold, aliened, remised, transferred, set over, released and confirmed and by these presents Do grant bargain, sell, alien, remise, transfer, set over, release & confirm unto the said people of the State aforesaid so much of the Lands and set apart in manner aforesaid as is contained within the limits and bounds following to wit: Beginning at a place on the East Bank of the Oneida Lake which place is a bisection of the distance between the mouth of Wood Creek and the mouth of the Oneida Creek, and runs from the said place of bisection Northerly along the Waters of the Oneida Lake to Wood Creek, thence up along Wood Creek until opposite Canada Creek being the North East corner of the Lands appropriated to the use of the said Tribe or Nation of Indians in the Treaty aforesaid Thence along the Eastern Boundary lines of the Lands so appropriated to the South East corner thereof, thence West along the Southern Boundary thereof to the South West corner

Exhibit C - Treaty of 1795 annexed to Complaint.

thereof, thence North along the Western Boundary thereof to the Deep Spring, thence Easterly by the boundary expressed in the said Treaty to the Chittilingo Branch of Canassaderaga Creek thence Southerly along the said Branch so far as to be One mile distant from the Northern Boundary of the Tract of Land leased by the said Tribe or Nation to Peter Smith, thence East by a Line parallel to the said Northern Boundary so far as to a point four miles distant from the Eastern boundary of the Tract so appropriated as aforesaid thence Northerly by strait lines parallel to the Eastern boundary lines of the Lands so appropriated and Keeping four miles distant therefrom until it reaches a place four miles distant from Wood Creek, thence with a strait line to the place of beginning. Excepting thereout so much of the Lands granted to the Stockbridge Indians as is included within the bounds aforesaid; and also Excepting thereout one mile square to include a small settlement of the said Tribe or Nation on the East side of the Lands granted to the Stockbridge Indians; and also all the Lands lying on the North side of the Oneida Lake appropriated and set apart to the use benefit and behoof of the said Nation of Indians at the Treaty aforesaid, and also the Land at the fishing place in the Onondaga River mentioned in the Treaty aforesaid. To have and to hold all and singular the Lands aforesaid to the people of the State of New York aforesaid for Ever. On condition nevertheless That the said people aforesaid shall immediately on the Execution and Delivery of this Indenture by the said parties of the first part pay to the said Indians the sum of Two thousand nine hundred and Fifty two dollars and annually forever thereafter on the first day of June in each year the like sum of Two thousand nine hundred & fifty two Dollars, at Oneida in the county of Herkimer together with the sum of Six hundred Dollars stipulated by the Treaty aforesaid to be paid to the said Indians; and

Whereas Doubts have arisen whether the Tract of Land lying between the Streams known by the name of the Chellingo and the Canaseraga Creeks was intended by the Treaty aforesaid to be included within the limits of the Lands so appropriated and set apart for the aforesaid Indians or not; The parties aforesaid Do by these presents mutually agree That if the Legislature of the State aforesaid shall Quit-claim to the said Indian Tribe or Nation the Lands between the said Streams as far South as an Easterly line from the Deep Spring to the Easternmost of the said Streams, to be drawn by the shortest distance between the said Spring and the said Easternmost Stream, and as far North as the junction of the said two

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Streams, That then and in that case the said tribe or Nation of Indians shall and they Do by these presents grant, bargain, sell, alien and release to the people of the State of New York aforesaid All that certain Tract of Land within the limits and bounds following Viz! Beginning at the East end of the Oak ridge in the great Road leading from the Oneida Village to the Deep Spring, and runs thence South to the North Bounds of this Tract herein before described as released to the people of this State, thence East along the said North bounds two miles, thence North to the East side of the said Road, thence North one half Mile thence with a strait line parallel to the General course of that part of the said Road between the East and West Bounds of this Tract until the place of beginning bears South thence South to the place of beginning. Provided always and it is the true intent of these presents that the said Tract shall be surveyed at the expence of the people of the said State, and the quantity of acres contained therein determined, and that for every hundred acres contained therein there shall be annually paid by the people of the State of New York the the sum of three Dollars the first payment to be made on the said first day of June next, and a like Sum annually forever thereafter on the first day of June in each Year at Oneida aforesaid; but in case the Legislature of the said State shall not Quit claim the Lands between the said Streams as last aforesaid that then and in that case the Lands described in this article as ceded to the said people shall be and remain to the said Tribe or Nation of Indians; as if this article had never been made and concluded upon anything herein contained to the contrary notwithstanding ; and

Whereas there was appropriated and set apart to the use, benefit and behoof of the said Tribe or Nation of Indians by the Treaty aforesaid one half mile of Land on each side of Fish Creek ; and

Whereas the said tribe or Nation of Indians incline to sell so much of the said Lands as lay to the Northward of a certain Creek falling into the said fish Creek, and coming from towards Fort Schuyler ; and

Whereas it is not possible without a previous Survey to determine the quantity of Lands which they so incline to sell nor the junction of the Creek beyond which the said Tribe or Nation of Indians incline to sell The parties aforesaid Do therefore further mutually agree by these presents, That whenever the quantity of Land comprized within the last mentioned bounds shall be ascertained and the Legislature of the said State shall determine to purchase the same and pass an act for that purpose that then and in that case the said Tribe or Nation of Indians shall be and hereby are bound to

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convey and release the same to the people of the State of New York aforesaid; provided that the said people shall annually forever thereafter pay unto the said Tribe or Nation of Indians at and after the rate of three Dollars per annum for every hundred acres contained in the said last mentioned Tract of Land provided always and it is the true intent and meaning of these presents that the said parties of the first part shall when thereunto required assign, transfer, and set over to the aforesaid people the Lease by them heretofore given to Peter Smith of part of the Lands herein first above mentioned.

In Witness Whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first herein before first above written

JOHN his x mark SKANONDO [L. s.]

WILLIAM his x mark TAGHTAGHGIVESIRE [L. s.]

ANTHONY his x mark SHONONGHIYO [L. s.]

JACOB REED [L. s.]

MARTINUS his x mark ALSHINSHA [L. s.]

PETER his x mark BREAD [L. s.]

JACOB his x mark DOXTADER [L. s.]

THOMAS his x mark TEHOHEARIETHA [L. s.]

CHRISTIAN his x mark KANYARODON [L. s.]

JOHN his x mark DENNY [L. s.]

JOSEPH his x mark HOT ASHES [L. s.]

THANJOTON his x mark [L. s.]

NICHOLAS x JEHOTSKARIAON [L. s.]

MOSES his x mark CHAHAGIGHTE [L. s.]

PETER his x mark TEKAWIGATIGHRON [L. s.]

Exhibit C – Treaty of 1795 annexed to Complaint.

[17]

EZEKIEL his mark X SHAWSTAGOWA [L. S.]

JOHN JOURDAN [L. S.]

ELEAZAR his mark X SHANEWIS [L. S.]

PAUL his mark X TEHONEVATASE [L. S.]

ABRAHAM his mark X ONEGERENGHTE [L. S.]

PH. SCHUYLER [L. S.]

JOHN CANTINE [L. S.]

D. BROOKS [L. S.]

Sealed and delivered in the presence of. NOTE. The words "four miles distant from the Eastern Boundary of the Tract so appropriated as aforesaid, thence Northerly by strait lines parallel to the Eastern boundary "lines of the Lands so appropriated and and keeping four miles distant therefrom until it reaches a place," were interlined before Execution—interlined between the twelfth & thirteenth Lines, between the words *Point* and *four*—the words *appropriated* throughout the whole of the above Instrument written on Erasures before the Execution thereof.

EPH^M VAN VECHTEN,
JAMES DEAN.

STATE OF NEW YORK

Be it remembered that on the Sixteenth day of September One thousand seven hundred and ninety five personally appeared before me Egbert Benson Esquire one of the Judges of the Supreme Court of the said State James Deane one of the within subscribing Wittnesses who being duly sworn did depose that he saw Philip Schuyler, John Cantine and David Brooks the agents therein named and the twenty Indians whose names are thereto subscribed seal &

Exhibit C - Treaty of 1795 annexed to Complaint.

deliver the within Indenture, and that he the deponent subscribed his name as a Wittness thereto, and saw Ephraim Van Vechten the other Wittness also subscribe his name thereto, and I having Inspected the same and not finding any erazures or Interlineations therein other than those noted to have been made before Execution do allow it to be Recorded.

EGBT. BENSON—

The preceding Instrument is a true Copy of the Original words *first above written* last line page 177 and words "*Ph: Schuyler (L S) John*" 10th line page 178 written on Erasures and word *said* at 11th line page 174 interlined Compared therewith this 28th day of March 1796 By Me

LEWIS A. SCOTT,
Secretary

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York on the first Day of June in the Year One Thousand Seven Hundred and Ninety Eight.

PRESENT, Joseph Hopkinson Commissioner appointed under the authority of the United States to hold the Treaty Egbert Benson Ezra L'Hommedieu and John Tayler Agents for the State of New York.....

The said Indians having in the month of March last Proposed to the Goveronor of the said State to cede the Lands herein after described, for the compensation herein after mentioned—and the said Governor having acceded to the said Proposal, and advanced to the said Indians, at their desire in part Payment of the said Compensation Three Hundred Dollars to answer their then immediate occasions the said cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty, which hath on the request of the said Governor been appointed to be held for the purpose as follows, that is to say, the said Indians do cede release and quit claim to the People of the State of New York forever All the Lands within their Reservation to the Westward and Southwestward of a Line from the Northeastern corner of Lot No. 54 in the last purchase from them running northerly to a button wood tree marked on the east side Oneida R 1798 On the West side FP. S. 1798. and on the South side with three Notches and a blaze standing on the bank of the Oneida Lake in the Southern part of a Bay called Newageghkoo Also a Mile on each side of the Main Genesee Road for the distance of one mile and an half westward to commence at the Eastern boundary of their said Reservation—And also the same

AMENDED COMPLAINT, Filed 7-29-70.

[22]

(SAME TITLE).

Plaintiffs hereby amend their complaint in the above-entitled action and allege and show as and for an alternate, separate, and distinct cause of action a new paragraph, "22", as follows:

22. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of such use and occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least $10,000.00, exclusive of costs and interest.

WHEREFORE, plaintiffs demand judgment against defendants in the sum of at least TEN THOUSAND DOLLARS ($10,000.00), plus such other and further monetary damages as the Court may deem just.

BOND, SCHOENECK & KING

By s/ GEORGE C. SHATTUCK

Attorneys for Plaintiffs
Office and P.O. Address
1000 State Tower Building
Syracuse, New York 13202
Telephone (315) 422-0121

NOTICE OF MOTION TO DISMISS, Filed 11-12-70.

[23]

(SAME TITLE).

SIR:

PLEASE TAKE NOTICE, that upon the amended complaint herein and the annexed affidavit of William L. Burke, Esq., sworn to the 2nd day of November, 1970, a motion will be made at a Special term of this Court, to be held at the Federal Building in the City of Utica on the 23rd day of November, 1970, at ten o'clock a.m. in the forenoon of that day, or as soon thereafter as counsel can be heard, for a judgment dismissing the amended complaint upon the following grounds:

1. The Court has no jurisdiction. Section 52 of the County Law states that the place of trial, when the County is a defendant, shall be in the county against which the action was brought. Further, the Court does not have jurisdiction of the subject matter on the ground of the diversity of citizenship, since one of the parties, plaintiff, The Oneida Indian Nation of New York State, are citizens of the same state as the defendants, County of Oneida and County of Madison.

2. The Complaint fails to set forth a cause of action.

[24]

3. It appears on the face of the plaintiffs' Complaint, a copy of which is attached hereto and marked Exhibit "A", that the claim asserted did not accrue, if in fact, it accrued at all, to the plaintiff within six years before the initiation of this action and, therefore, the action is barred by the statute of limitations.

4. The prolongation of the institution of the within suit by the plaintiffs is barred by laches.

5. The current owners of the land alleged to be

withheld illegally from the plaintiffs have been held by their present occupants and their predecessors in title by adverse possession for over 150 years.

6. The defendant, County of Madison, as a bonafide purchaser for value of said premises without notices as to any alleged fraud involved in the purchase thereof from the plaintiffs and, therefore, is not a proper party in this action.

7. The plaintiffs' have not exhausted all of their remedies, since they presently have an identical claim pending against the United States of America before the Federal Indian Claims Commission.

8. Chapter 70 of the Laws of 1806 created the County of Madison, which originally was part of the County of Chenango. Section 8 of the Court of Claims Act became law in 1920 by chapter 922. That section stated that the State waived immunity from liability in an action and henceforward would assume liability and consented to have the same determined in accordance with the same rules and laws as applied to actions in the Supreme Court against individuals and corporations. The cause of action in the instant case arose many years before Section 8 of the Court of Claims Act became law. [25]

9. There is no enabling act which permits the within plaintiffs' to institute the cause of action alleged in the plaintiffs' Complaint.

10. The controversey alleged in the Complaint actually would be against the United States of America, and/or the State of New York and not the County of Madison, since the County of Madison was not created until 1806, which date is subsequent to the alleged depravation of land owned by the plaintiffs' forebearers.

Notice of Motion to Dismiss, Filed 11-12-70.

11. And for such other and further relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that answering affidavits, if any, are to be served upon the undersigned at least five (5) days before the return date of this motion.

Dated: November ____, 1970.

WILLIAM L. BURKE, ESQ.
Attorney for Defendant
County of Madison
Office & P.O. Address
29 Lebanon Street
Hamilton, New York 13346
Tel. (315) 824-3550

TO:

BOND, SCHOENECK & KING
Attorneys for Plaintiffs
Office & P.O. Address
1000 State Tower Building
Syracuse, New York 13202
Tel. (315) 422-0121

AFFIDAVIT OF WILLIAM L. BURKE IN SUPPORT OF MOTION TO DISMISS.

[26]

(SAME TITLE).

STATE OF NEW YORK)
COUNTY OF MADISON) ss.:

WILLIAM L. BURKE, being duly sworn, deposes and says:

1. I am the Madison County Attorney and as such I am familiar with all the records and proceedings of this action.

2. As more fully appears from the amended complaint, a copy of which is annexed hereto, this action is essentially an action for money damages predicated upon the alleged breach by the defendants' of several federal treaties and sections of the United States code.

3. This action was commenced by the service of a Summons and Complaint upon the defendant, County of Madison, on the 9th day of February, 1970. Through a series of extensions of time to answer, granted by the attorney for the plaintiffs' to the attorneys for the defendants, issue has not been joined and the time to answer has not expired.

4. More particularly and in support of the Motion to Dismiss upon the ground:

1. The Court has no jurisdiction. Section 52 of the County Law states that the place of trial, when the County is a defendant, shall be in the county against which

[27]

the action was brought. Further, the Court does not have jurisdiction of the subject matter on the ground of the diversity of citizenship, since one of the parties, plaintiff, The Oneida Indian Nation of New York State, are citizens

of the same state as the defendants, County of Oneida, and County of Madison.

2. The Complaint fails to set forth a cause of action.

3. It appears on the fact of the plaintiffs' Complaint, a copy of which is attached hereto and marked Exhibit "A", that the claim asserted did not accrue, if in fact, it accrued at all, to the plaintiff within six years before the initiation of this action and, therefore, the action is barred by the statute of limitations.

4. The prolongation of the institution of the within suit by the plaintiffs' is barred by laches.

5. The current owners of the land alleged to be withheld illegally from the plaintiffs have been held by their present occupants and their predecessors in title by adverse possession for over 150 years.

6. The defendant, County of Madison, as a bonafide purchaser for value of said premises without notices as to any alleged fraud involved in the purchase thereof from the plaintiffs and, therefore, is not a proper party in this action.

7. The plaintiffs' have not exhausted all of their remedies, since they presently have an identical claim pending against the United States of America before the Federal Indian Claims Commission.

[28]

8. Chapter 70 of the Laws of 1806 created the County of Madison, which originally was part of the County of Chenango. Section 8 of the Court of Claims Act became law in 1920 by chapter 922. That section stated that the State waived immunity from liability in an action and henceforward would assume liability and consented to have the same determined in accordance with the same rules and laws as applied to actions in the Supreme Court against

individuals and corporations. The cause of action in the instant case arose many years before Section 8 of the Court of Claims Act became law.

9. There is no enabling act which permits the within plaintiffs' to institute the cause of action alleged in the plaintiffs' Complaint.

10. The controversy alleged in the Complaint actually would be against the United States of America, and/or the State of New York and not the County of Madison, since the County of Madison was not created until 1806, which date is subsequent to the alleged depravation of land owned by the plaintiffs' forebearers.

11. And for such other and further relief as to this Court may seem just and proper.

s/ WILLIAM L. BURKE
William L. Burke
Madison County Attorney

(Sworn to November 2, 1970).

AFFIDAVIT OF JACOB THOMPSON AND GEORGE C. SHATTUCK, Filed 11-18-70.

[48]

(SAME TITLE).

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

JACOB THOMPSON, of Route 11-A, Nedrow, New York, and GEORGE C. SHATTUCK, of 210 Sedgwick Drive, Syracuse, New York, being duly sworn, depose and say:

1. This is a joint affidavit based on extensive research by deponents; in the case of deponent, JACOB THOMPSON, research over at least a ten year period on the historical and legal status of the Oneida Indians.

2. JACOB THOMPSON is an Oneida Indian and is currently the President of the Oneida Indian Nation of New York. GEORGE C. SHATTUCK is one of the attorneys for the Oneida Indians under a retainer contract approved by the Department of Interior.

3. This affidavit shows the factual background of the Oneida Indians' claim against Oneida and Madison Counties.

4. After the Revolutionary War, in which the Oneida Indians fought on the side of the Colonies, the Oneidas owned in good fee title between 4,000,000 and 6,000,000 acres of land in what is now New York State. (See attached map published by the New York State Museum, Exhibit "I".) Thereafter this land

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was acquired from them by the State for completely unfair and inadequate consideration; and in many cases in violation of the Federal Constitution, Federal Treaties, and the Federal Indian Law, currently Section 177 of 25 USCA.

5. A state can be sued only with its own consent and the 11th Amendment to the United States Constitution bars suit against a state in federal courts. Therefore, the

Affidavit of Jacob Thompson and George C. Shattuck,
Filed 11-18-70.

Oneida Indians have never had a forum in which to present their claim against the State. There is, however, no bar to a suit against a political subdivision of a state, such as a County. Further, until recently the courts of New York have held that an Indian Nation had no status to sue in New York courts.

POST REVOLUTIONARY WAR

6. History can sometimes best be understood in terms of geography. What happened to the Oneidas is a good example: They were in the way. The western boundary of the white man's domain was fixed by the Treaty of 1768 at a line roughly north and south from Rome, New York. After the Revolution the move West was irresistable and the fact that the Oneidas had helped New York and the other Colonies during the Revolutionary War did them no good. Neither laws nor fair play stopped the ultimate loss of possession of the Oneida Reservation.

7. In 1783 the New York Legislature empowered commissioners to try to get the Oneidas to leave their lands and move West to land then owned by the Senecas. "The Treaty of Fort Stanwix", by Henry S. Manley, p. 28. Later in 1783 General George Washington visited the Oneidas to investigate their complaints and as a result of his visit, the Continental Congress delegated to its commissioners power to effect a peace treaty with the warring Indians and to reassure the Oneidas and Tuscaroras as to their lands. Manley, pp. 44, 46.

This treaty was effected in 1784 at Ft. Stanwix. [50]

With the U.S. delegation were James Madison and the Marquis de Lafayette. Lafayette, who had great influence with the Indians, told them:

> "In selling your lands, do not consult the keg of rum and give them away to the first adventurer, but let

> the American chiefs and yours, united around the fire, settle on reasonable terms." History of Oneida County (1878) p. 63.

In this treaty, the United States promised that "The Oneida and Tuscarora Nations shall be secured in the possession of lands in which they are settled." Article 2.

A look at a topographic map of New York State shows why the fledgling federal government failed to keep its promise. Both the Northern and Southern parts of the State are hilly with most valleys running North and South. In terms of canals, ox-wagons and travel afoot, the Mohawk River Valley and its continuation west along the southerly shore of Oneida Lake was the only gateway to the West. It is not just chance that the Erie and Barge Canals, the main railroad tracks and roads, and the New York Thruway all follow roughly the same route. The old Genesee Road, now U.S. Route #5, was a former Indian trail across the heartland of the Oneidas, to their capitol at Oneida Castle, New York.

It was perhaps inevitable that the small Oneida Nation would bow before the mighty destiny of New York State. The question remains before us as to what may be done to rectify the great wrong done.

THE LAND CESSIONS

8. The 1784 treaty between the Iroquois Nation and the United States was proclaimed on October 22, 1784. Just eight months later, June 28, 1785, the Oneidas sold to New York State about 300,000 acres in what is now Broome and Chenango Counties for $11,500 -- about $.04 per acre. In 1788 the Oneidas sold to the State all the rest of their lands, say, 4,000,000 acres,

[51]

excepting a tract in Madison and Oneida Counties, for $15,500. The excepted tract was denoted their Reservation

and included about 300,000 acres. The 1788 price was about $.003 or $.004 per acre. All signatures of Indians on these treaties were made with an "X". Exhibit II is a map of such Reservation, including the land which Peter Smith tried to lease from the Oneidas.

9. In 1793 the New York Legislature (16th Sess. Chap. 51) authorized a committee to deal with the Oneidas for purchase of the rest of their land for an annuity not exceeding $5.00 per square mile, or $.008 per acre. This represents a principal price of $.14 per acre, when developers were selling land at $1.50 per acre and up.

10. In 1795 the Oneidas "sold" a large part of their Reservation to the State for an annuity of $.03 per acre forever. It is this tract which is the subject of this action and which is outlined in red on Exhibit II. This annuity figures out to a price of $.50 per acre at 6% or about $.43 per acre at 7%, the prevailing interest rates. Just two years later, the State resold the same land to settlers for an average of $3.53 per acre. See Hammond's "History of Madison County", p. 699. See Laws of New York, 20th Sess. Chap. 80, April 1, 1797. In 1795 Mr. John Lincklaen, as agent for the Holland Land Company, was selling land just south of the Reservation for $1.50 to $3.00 per acre. Hammond, p. 210.

As will be shown below, the 1795 purchase was illegal under federal law. See Section 4 of the Indian Non-Intercourse Act of July 22, 1970 (1 Stat. 138); Section 8 id of of March 1, 1793 (1 State. 330) and Section 177 of the present Federal Indian Law 25 U.S.C.A. The New York Legislature must have been concerned with the federal statute because in 1798 the State requested the appointment of and dealt with a federal commissioner on the further purchase that took place that year. See Laws of New York, 22nd Sess. Chap. 87, April 2, 1799.

Affidavit of Jacob Thompson and George C. Shattuck, Filed 11-18-70.

[52]

Over the next 40 years, the Oneidas "sold" the balance of their 300,000 acre Reservation to the State in a series of so-called treaties, all of which were in violation of federal law forbidding such sales without the consent of the United States. Section 177 of 25 U.S.C.A. The last such "sale" was in 1842. With rare exceptions the Indians signed these treaties with an "X", their mark. (The Oneidas presently have a claim pending against the United States and the Indian Claims Commission for allowing this to happen. The United States denies any liability.) A summary of the more important sales follows:

Date of Sale	Annuity Promised	Approximate Per Acre Price
1785	$ 0	$0.04
1788	$ 600	$0.004
1795	$3269	$0.50
1798	$ 700	-
1802	$ 300	$0.85
1802	$ 300	$0.85
1807	$ 645	$0.75
1809	$ 120	$0.56
1810	?	$0.50
1811	$ 332	$0.50
1811	$ 72	$0.50
1815	$ -	$1.00
1817	$ 121	$2.00
1824	$ 300	$2.60
1826	$ -	$3.00
1827	$ -	$3.50

11. The entire principal value of all annuities promised to the Oneidas is about $115,000. See "History of Oneida County", Everts & Fariss (1878) p. 66. Allowing for down payment, their original 4,000,000 to 6,000,000 acres were sold for less than $150,000 total. About $123,000 of this was for the 300,000 acres set aside as the Oneidas' Reservation in 1788 and confirmed to them by the treaty between the Iroquois and the United States at Canandaigua in 1794; Article 2, 7 Stat. 44; and by Section 177 of 25 USCA.

For their Reservation of about 300,000 acres, the Indians received a total principal price of less than $150,000, an average of no more than $.50 per acre. [53]

Of their original Reservation, the Oneidas, despite Section 177 of the Federal Indian Law, have only two small parcels left so far as record title is concerned. These are located on New York Route #46 just within the boundary of the City of Oneida, New York and near Route #5 in Sherrill, New York.

LAND VALUES

12. The Oneidas did not receive anywhere near a fair consideration, even allowing for the difference between wholesale and retail sales. Our research indicates that when the Oneidas were receiving annuities based on forty to fifty cents per acre, white men were buying and selling nearby land for cash at $3.00 to $10,00 per acre and up. When the Oneidas were receiving $1.00 to $3.00 per acre, white men were buying and selling for $10.00 per acre and up. Land values can be established from recitals in deeds contemporaneously filed in the Oneida, Chenango and Madison Counties Clerks' Offices and from the still extant records of Peter Smith and John Lincklaen, men who subdivided and made fortunes selling off the former Oneida lands.

To understand this, we must remember that Madison County was fully civilized and a "boom" area in the 1790's and early 1800's. Numerous turnpikes and the Erie Canal were being built right through the center of the Reservation. As the current official map and summary history of Madison County indicate, "A great influx of settlers to Madison County was promoted by these first highways", and "The County was rapidly settled, growth being stimulated by three main roads which crossed from East to West". By 1810 the County had a population of 25,000; by 1830 it was

39,000; by 1840 it was 40,000 and probably had more working farms and farmers than it has today.

13. To give some idea of the range of values circa 1785-1800, we submit the following extracts of price information found in official state records: [54]

(a) Massachusetts in 1787 sold to Samuel Brown 230,000 acres, west of the Oneidas' 1788 sale, for $0.125 per acre. Richards "Historical Atlas of New York State", p. 65. This was over thrity time per acre more than the Oneidas received for their 1788 sale.

(b) In 1788 Massachusetts sold to Nathaniel Gorham and Oliver Phelps the pre-emption right to purchase 6,000,000 acres of Western New York from the Indians. The consideration was $.03 per acre. See Richards, p. 65, and Whipple Report, p. 17. Under the Hartford Compact of 1786 the pre-emption right belonged to Massachusetts and the land itself to New York. The $.03 per acre was not for the land, but for the right to try to buy it from the Indians -- presumably at a fair price in addition.

(c) In 1791 Gorham and Phelps turned back 4,000,000 acres to Massachusetts, which then re-sold the pre-emption right to Robert Morris for $333,000, Richards p. 65. (Per the Whipple Report, p. 18, the price was $225,000.) This comes to $.08 per acre just for the pre-emption right.

(d) Over the next few years most of the lands purchased from the Oneidas in 1785 and 1788 were sold off. Richards p. 65, describes some of the prices:

— townships sold at auction from $.16 to $.80 per acre;

— Chenango townships, purchased from the Oneidas in 1788 for $.004, sold

for 3 shillings three pence ($.40?)
per acre in 1794;

-- Macomb's purchase in North Country at $.16 per acre for 4,000,000 acres in 1791 included former Oneida lands;

-- Scriba's patent in 1791 at $.16 per acre for land north of Oneida Lake;

-- Holland Land Company purchased 50,000 acres at about $.62 per acre just south of Reservation in 1792; and

-- same company purchased 64,000 additional acres for $.75 per acre in 1792. [55]

Remember, these lands were purchased from the Oneidas in 1788 for about $.004 per acre.

If the variations in these wholesale prices make little sense, we must remember that it was New York's policy to get the land settled as quickly as possible. The price it got for the land was not the important thing. In many cases it was sold at auction to the highest bidder.

14. As between white men, dealing in smaller lots at arm's length, we have a quite different picture. Following is a compilation of some early land sales in Chenango County (now Madison County). This covers roughly the 1795 period when the Oneidas received $.50 per acre and includes land immediately south of the Oneida Reservation:

From Early Real Estate Records
Chenango County, New York

Date	Page	Acres	Price	Price/Acre
1810	1	179	$ 126.	.71
1800	1	40	$ 200.	5.00
1798	1	11	$ 34.	3.00
1798	1	47	$ 225.	4.90
1799	1	51	$ 375.	7.40
1798	2	57	$ 400.	7.00
1800	2	10	$ 100.	10.00

Affidavit of Jacob Thompson and George C. Shattuck, Filed 11-18-70.

Date	Page	Acres	Price	Price/Acre
1795	2	50	£ 50.	£1.00
1799	2	64	$ 500.	7.80
1799	2	250	$ 950.	3.80
1799	2	50	$ 700.	14.00
1800	2	70	$ 900.	1.30
1796	2	50	$ 150.	3.00
1800	2	58	$ 35.	.60
1799	2	20	$ 100.	5.00
1801	3	57	$ 25.	.44
1800	3	40	$ 140.	3.50
1794	3	250	$ 125.	2.00
1799	3	20	$ 100.	5.00
1800	4	4	$ 60.	15.00
1799	6	20	$ 160.	8.00
1797	6	50	$ 269.	5.40
1799	7	20	$ 160.	8.00
1796	7	323	£ 323.	£1.00
1797	7	255	£ 267.	£1.00
1798	7	290		10 shillings
1797	8	100	$ 700.	7.00
1799	8	313	$1500.	4.80
1794	8	250	$ 125.	.50
1799	9	50	$ 227.	4.50
1798	9	101	$ 267.	2.60
1800	9	313	$1400.	4.50
1798	10	79	$ 300.	3.80
1799	11	150	$ 10.	.60

[56]

1799	11	51	$ 375.	7.40
1800	11	150	$ 75.	.50
1800	12	150	$ 75.	.50
1799	12	500	$ 550.	1.10
1798	12	160	$ 25.	.50
1801	12	179	$ 126.	.70
?	13	60	$ 240.	4.00
?	13	150	$ 318.	2.10
1800	14	58	$ 35.	.60
1798*	14	250	$ 858	3.40
1801	14	49	$ 71.	1.40
1798	14	57	$ 400.	7.00
1801	15	120	$ 340.	2.80
1801	15	24	$ 209.	8.80
1799	15	158	$ 160.	1.00
1796	15	50	$ 200.	4.00
1797	16	250	$ 500.	2.00
1800	19	40	$ 140.	3.50
1793	21	150	£ 116.	£3.00
1798	21	11	$ 34.	3.00
1793	21	150	£ 86.	£ 1/2
1798	21	150	$ 303.	2.00
1797	21	250	$ 500.	2.00
1798	21	250	$1250.	5.00
1797	21	250	$ 500.	2.00
1797	21	79	$ 300.	3.80
1798	21	117	$ 500.	4.30
1800	22	10	$ 100.	10.00
1798	22	250	$1250.	5.00
1798	22	250	$1513.	6.10
1797**	22	1-1/2	$ 830.	
1801	23	100	$ 500.	5.50

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Date	Page	Acres	Price	Price/Acre
1800	23	20	$ 104.	5.00
1800	23	150	$ 200.	1.30
1800	24	20	$ 101.	5.00
1796	24	50	$ 200.	4.00
	24	60	$ 240.	4.00
1800	24	4	$ 60.	15.00
1801	24	100	$ 550.	5.50
1799	25	110	$ 244.	3.00
1797	25	281	$ 844.	3.00
1799*	26	158	$ 127.	5.60
			+ 760. Mtg.Due	
			$ 887.	
1800	27	40	$ 900.	22.00
1801	27	117	$1220.	10.50
1799*	27	158	$ 160.	5.80
			+ 760. Mtg.Due	
			$ 920.	
1798*	28	250	$ 858.	3.40
1799	28	50	$ 237.	4.80
1799*	28	110	$ 244.	2.20
1801	29	125	$ 390.	3.10
1799	29	160	$ 250.	1.50
1801	30	42	$ 213.	5.00
1797	30	250	$ 250.	1.00
1799	30	500	$ 550.	1.10
	30	313	$1400.	4.50
1797	31	250	$ 250.	1.00
1798	31	117	$ 500.	4.30
1800	32	150	$ 133.	.89
1801	33	50	$ 250.	5.00
1796	34	50	$ 150.	3.00

[57]

1796	35	323	£1221.	£3.50
1797	35	4065		5 shillings
1798	35	291		10 shillings
1797	35	281	$ 844.	3.00
1800	35			5 shillings
1801	36	24	$ 207.	8.80
1796	36	125	£ 75.	£ .50
1800	36	70	$ 900.	12.20

* Former Oneida Reservation
** Town Lot

Note: Because the lists contained both grantors and grantees, there may be considerable duplication in the above transactions. However, they do give a rough idea of what land to the south of the Reservation as of 1795-1800 was selling for.

Affidavit of Jacob Thompson and George C. Shattuck, Filed 11-18-70.

15. What standards should be applied to measure the difference between what the Oneidas received and should have received are for expert witnesses at a trial of fact. The point is that the Oneidas were defrauded of their land under official state policy. Although the 1785 and 1788 purchases preceded Section 177 of 25 USCA, this review shows what the policy was. A text on "The Holland Land Company" p. 192, sums this up:

> ". . . Here the usual accounts of the Big Tree Treaty end but unhappily this, like most other treaties with the Indians, has an unsavory side which originally was concealed as far as possible and has rarely been spoken of since. From the time when Indians were recognized as independent nations who possessed rights in the lands they occupied, the Indian status was anomalous. Their ownership was something different from the ownership of Spaniards and Canadians over the border. The morality of the day, not so different after all from that of our own, countenanced universally measures for the purchase of such ownership at prices far below its true value. No one thought of paying the Indian the full worth of his lands. No commissioner, appointed by the President to see justice done at the treaties, felt for a moment that it was his duty to warn the Indians that they were being unfairly treated. He did not indeed believe that they were. Nor did Government at the time . . ."

LAND TITLES

16. This is not the first time the New York Indians have asked for justice. In 1888-89 a special committee of the Legislature, headed by Assemblyman Whipple of Salamanca, made a complete investigation of the "Indian Problem". See Assembly

Document #51, February 1, 1889, commonly known as the "Whipple Report". This document sets forth the history of the Oneidas' land cessions in detail, including all their treaties with the United States and New York.

17. In 1919 the Legislature again created a special committee to investigate the New York Indians' status. The Chairman of the Committee, Assemblyman Edward A. Everett, published a report that the Iroquois Indians were still the fee owners of most of New York State. The other members of the Committee refused to sign this report, one saying it was not their job to "dig up irrelevant matters from the past".

18. For current legal authority on the title issue, we can look to the four-square holding of the Second Circuit Court of Appeals in the Tuscarora case, 257 F. 2d 885 (1958). The main issue there was whether Section 177 applied to condemnation of Indian Reservations by the State of New York. The State and its agencies claimed that it could acquire title from Indians without the presence of a U. S. Commissioner and without consent of the United States. The brief of Louis J. Lefkowitz, Attorney General in that case, states at page 34:

> "The Indian Intercourse Act of 1802 (2 Stat. 103) provides that title to Indian lands must be extinguished by a treaty made in the presence of a United States Commissioner. The provisions of that act, however, are not applicable to the thirteen original states which, it will be remembered, derived their title to Indian lands directly from the British Crown and not from the Federal Government. (Citations)
>
> "Actually, a very large number of agreements were made with the New York Indians extinguishing their

titles without the presence of a United States Commissioner . . ." (Emphasis Added)

The brief of Thomas F. Moore, Jr., Attorney for the New York Power Authority, makes this same point at pages 12-23. It states in part:

[59]

"Except for the period from 1790 to 1793, New York made a practice of purchasing Indian rights of aboriginal occupancy without the intervention of the Federal Government." p. 12 * * *

"While as our memorandum below shows, at pages 27, 49-52, New York purchased some Indian land rights at Federal treaties subsequent to 1793, in most instances when it purchased such rights it did so without Federal intervention. A vast part of the territory within the State was purchased by the State without such intervention. The present day title to this area depends upon the validity of these purchases. Invariably when such purchases were challenged the courts have sustained them." (Emphasis added)

The cases cited by Mr. Moore for the above are interesting. Seneca Nation v. Christie, 126 N.Y. 122, 162 U.D. 283, was decided upon the narrow issue of the statute of limitations. Deere v. State Power Authority, 32 F. 2d 550 (1927), was decided on the issue that an action of ejectment does not present a federal question just because the plaintiffs were Indians. U. S. v. Franklin Co., 50 F. Supp. 152 (1943), and St. Regis v. State, 5 N.Y. 2d 24 (1958), do squarely hold that Section 177 does not apply to New York State. The St. Regis case was decided by the New York Court of Appeals in June 1958 and the Tuscarora case by the Second Circuit in July 1958. This presents a square conflict between state and federal courts, which even now the New York Courts are tending to resolve in

favor of federal constitutional pre-eminence. See Pierce v. The State Tax Commission of the State of New York discussed below.

19. An article, "Drums Along The Power Ways", Albany Law Review 1958, says:

> "The decisions of the federal court - (Tuscarora case) - impugns the validity of past and contemporary takings of Indian lands and throws many Indian alienated titles in the State of New York into chaos and confusion."

The memorandum referred to in the Power Authority's brief (quoted above) states that: [60]

> "Since 1793, the Federal statute - (Section 177) - has not been considered a prohibition applicable to purchases of Indian lands in New York State. At least thirty-nine agreements or 'treaties' have been entered into since then by which Indian land rights were acquired without the presence or supervision of a United States Commissioner. Titles to hundreds of thousands of acres in New York State stem from such agreements or 'treaties'." p. 27.
>
> * * *
>
> "No participation by the United States was invited or given during the years 1793-1845 when the State of New York made 24 other treaties with various bands of Oneidas, 6 with the St. Regis, 5 with the Onondagas, 3 with the Cayugas, and at least one with the Senecas. Titles to very large and important parts of the State are held under these treaties and they always have been and still are regarded as valid." p. 52.

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20. A fairly complete history of these "treaties" and the federal-state relation is set out in the affidavit of Henry S. Manley which appears in the record of the Tuscarora case. This affidavit, which was submitted in behalf of the Power Authority, states in a footnote on page 7 thereof:

> "Titles to large areas of the State would be invalidated, as well as important rights upon the existing reservations (such as railroad line and utility lines and highways across the reservation now involved) if the plaintiffs' contentions were upheld."

21. Presumably to Mr. Manley's surprise, the "plaintiffs' contentions", the Indians' contentions, were upheld by the Second Circuit on this point. The final holding of the United States Supreme Court clearly reinforces the Second Circuit's decision on the applicability of Section 177 to New York State. See Footnote #18 of Opinion at 80 S. Ct. 556, which states that the U.S.:

> ". . . promised to hold the Oneidas and Tuscaroras secure in the lands on which they lived—which were the lands in Central New York about 200 miles east of the - (Tuscarora) - lands in question."

It distinguished the Tuscarora lands near Niagara Falls on the ground that title there derived from the Holland Land Company by purchase and that the particular land was not the the same as referred to in the treaties with the United States. The lands involved in

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this case are the very same lands which they owned when the U.S. treaties were made and which they had owned, occupied and protected as their ancestral hunting grounds long before Columbus was born. They are the very same lands referred to in the Supreme Court's footnote cited above.

Affidavit of Jacob Thompson and George C. Shattuck, Filed 11-18-70.

22. The implications of the Tuscarora decision are staggering. The State in its legal papers admitted that title to large areas of the State were at stake--and then lost. An article in the Buffalo Law Review, Fall 1958, assesses the effect of the Tuscarora decision of the Second Circuit:

> "The Tuscarora decision of the Court of Appeals came, after all, in a case which the state deliberately chose to make the most elaborate presentation of its position and to argue on the broadest possible grounds. All the greater the significance then--and all the more penetrating the likely impact-- of the repudiation of New York's contentions." p. 21.

LEGAL STATUS OF ONEIDAS

23. The Oneidas are a nation within a nation. It seems strange in this day that there exist in New York State several independent nations, among them the Oneida Indian Nation. Yet this is so. Several U.S. treaties recognize and deal with the "Oneida Nation" and these are in effect today with the full force of law. See Treaties of 1784, 1789, and 1794. They are the law of the land. At least twenty-four "treaties" with New York also recognize and deal with the Oneida Indian Nation, the first in 1785 and the last in 1846.

24. A generation ago, the federal courts reaffirmed the status of the Oneidas in U. S. v. Boylan, 256 F. 468 (2d Cir. 265 F. 165).

25. Last Spring, right on schedule, the Oneidas received their quota of unbleached muslin cloth as promised under the federal treaty of 1794. In appropriating money for this purpose, Congress has continually reaffirmed the treaty obligations of the United States. [62]

26. A very recent decision of the Appellate Division,

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Fourth Department, New York Supreme Court, affirms the vitality of the Six Nations Treaty:

> **". . . The power of Congress to deal with them - (the New York Indians) - regardless of New York's actions or desires is unquestioned."**
>
> *** * ***
>
> **"Legislative power over Indian affairs is vested in Congress. 'The Congress shall have power ... to regulate Commerce with foreign Nations ... and with the Indian Tribes.' (U.S. Const. Art. I, §8, cl. 3. See, e.g., Hallowell v. United States, 221 U.S. 317; Worcester v. Georgia, 31 U.S. (6 Pet.) 515; United States v. Kagama, 118 U.S. 375; United States v. Thomas, 151 U.S. 577.) There is no doubt the legislation implementing this Constitutional mandate ousts state law on the same subject and to the extent that a state enactment otherwise valid interferes with or impedes the operation of a federally-created scheme to fulfill the obligation toward the Indians, the state law must fall. (McCulloch v. Maryland, supra; Board of County Commr's. v. United States, 308 U.S. 343.) Thus if any interference with the federal program for the Indians can be shown to result from the taxes sought to be imposed, the taxes must be struck down and the judgment below affirmed."**

The above quoted language is from Pierce vs. The State Tax Commission of the State of New York, decided January 11, 1968, by the Appellate Division, Fourth Department. This case holds that the State cannot tax sales of articles made and sold on an Indian Reservation.

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THE PURCHASE OF 1795

27. This memorandum has sought to picture a broad sweep of history from the time of the American Revolution, when the Oneidas helped feed Washington's army at Valley Forge and stood in battle at the side of Colonial troops at the battles of Oriskany and Fort Plain, to the mid-1840's when the last pitiful remnants of the Oneida Reservation were bartered away to their former allies.

28. To put things in a sharper focus, this section deals with a limited phase of the history of the Oneidas. It deals with the very tract at issue in this case. See Exhibit II where outlined in red. This is unlike the usual "Indian case" where

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experts and historians theorize on what land hundreds of miles west of the Frontier was worth. In much of the period described herein, the Oneidas' Reservation was hundreds of miles east of the Frontier, in settled, civilized and organized country. Land values here are not a matter of speculation. They are established by recorded deeds of nearby parcels, state laws and other contemporary records, including the books of account of the very men who sub-divided and sold off the Oneidas' Reservation. (Deponents have studied the books of John Lincklaen, agent for the Holland Land Company, at his home in Cazenovia, New York. The books and journals of Peter Smith, who bought and sold land over the entire area, are in the Library of Syracuse University and Cornell University.)

Let's take a look at the "treaty" of 1795 between the Oneidas and New York State in which they sold to the State a huge slice of the Reservation confirmed and guaranteed to the Oneidas by federal treaties and federal law. The consideration for the 1795 sale was expressed in terms of a perpetual annuity in dollars for measured land plus an annuity of three dollars per year for every hundred acres

on certain unmeasured land. This amounts to a principal price of $.50 per acre for very valuable and desirable land. No United States Commissioner was present and the United States has never ratified this sale. Every Indian who signed the treaty used an "X".

29. In the period 1792-1795 the Holland Land Company, through its agent, John Licklaen of Cazenovia, was selling tracts of nearby land (not part of the Reservation) at from $1.50 to $4.00 per acre unimproved. From 1795 to the early 1800's nearby land was sold to settlers at $4.00, $5.00, and $6.00 per acre. According to Lincklaen's records, land involved in the 1795 purchase, the New Peterbourgh Tract, was sold off at from $6.00 to $10.00 per acre from 1800 to 1805. [64]

Despite some tapering off of the land boom after 1795, the land purchased by the State for $.50 per acre in 1795 was sold off in 1797, just two years later, to white settlers and developers, including the aforementioned Peter Smith, for $3.535 per acre. This represents a profit to the State of $3.035 per acre in just two years. Also, the Oneidas did not receive cash; they received only a perpetual annuity of $0.03 per acre (6%).

30. As of 1795, the Indian Non-Intercourse Act of March 1, 1793 (1 Stat. 330), substantially the same as the present Section 177, was in effect. New York cannot argue now that this statute was not applicable to New York because the State Legislature in 1796 and 1798 recognized the power of the U.S. Commissioner for Indian Affairs in New York. See Laws of New York, Nineteenth Session, Chap. 39 (1796) and Twenty-Second Session, Chap. 87 (1798). The minutes of the New York Land Office, p. 99, Vol. 3, recite that the U.S. Commissioner, Joseph Hopkinson, was present at the Oneidas' 1798 cession to the State. One wonders why the State breached the law in 1795 and observed

it in 1798, and after the 1798 purchase again disregarded federal law which its own Legislature had recognized as applicable in 1798.

The 1795 purchase was only one of a series of similar transactions in which the Oneidas lost their entire 300,000 acre Reservation.

THIS CASE IS PROPERLY BEFORE A FEDERAL COURT

31. Section 194 of 25 USCA shows that the Federal Courts are endowed with jurisdiction over cases on Indian land questions. If Section 177 of USCA applied to New York State, and recent court decisions uniformly hold that it does, then Section 194 also applies:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." §194, 25 USCA.
>
> [65]
>
> "This section is evidence of the policy of the government to give Indians the benefit of the doubt on questions of fact or construction of treaties or statutes relating to their welfare." Anno. to Section 194 in official report referring to 34 Op. Atty. Gen. 439 (1925).

32. It may be asserted by the State that too much time has passed for the Oneidas now to press their claim. The other side of this coin is that 173 years is a long time to wait for justice. No statute of limitations or equitable laches bars the claim. U.S. v. State of Minnesota, supra; U.S. v. 7405.3 Acres of Land, 97 F. 2d 417 (CCA 4, 1938); U.S. v. Forness, 125 F. 2d 928 (CCA 2, 1942).

Even if the suit were by the Indians and not the United States, no state statute of limitations would be allowed to frustrate federal law and federal constitutional policy. Schrimpscher v. Stockton, 183 U.S. 290, 22 S. Ct. 107 (1902). In fact, until very recently an Indian nation or tribe had no capacity to sue as such in the State Courts of New York. See "New York Jurisprudence" §17; Pharaoh v. Benson, 164 A.D. 51 (1914), affd. 222 N.Y. 665; St. Regis Tribe v. State of New York, 4 Misc. 2d 110 (1956), reversed on other grounds 5 A.D. 2d 117.

For these 170 years the New York Indians have been precluded from recovering their lands by a maze of legal technicalities; Pharaoh v. Benson, supra; Seneca Indians v. Christie, 126 N.Y. 122 (1891); and Deere v. St. Lawrence Pow. Co., et al, 32 F. 2d 550 (CCA 2, 1929). Only the Courts of the United States can free the Oneidas from the legal bondage imposed on them by the Courts of New York.

33. The Congress of the United States was empowered to regulate commerce with the Indian Tribes under Article IX of the Articles of Confederation and under Article 1, § 8, of the United States Constitution. Under this power, treaties were made with the Oneidas, which read in part as follows: [66]

Treaty with Six Nations - Ft. Stanwix 1784

"Article 2. The Oneida and Tuscarora Nations shall be secured in the possession of lands on which they are settled.

Treaty with Six Nations - Ft. Harmar 1789

"Article 3. The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

Affidavit of Jacob Thompson and George C. Shattuck, Filed 11-18-70.

Treaty with Six Nations - Canandaigua 1794

"Article 2. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

"Article 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree that for injuries done by individuals on either side no private revenge or retaliation shall take place, but instead complaint shall be made by the party injured to the other: by the Six Nations or any of them to the President of the United States . . . and such prudent measures whall then be pursued as shall be necessary to preserve our peace and friendship unbroken ..."

Treaty with Oneida, Tuscarora and Stockbridge Indians - Oneida 1794

"Whereas, In the late war between Great Britain and the United States of America, a body of the Oneida and Tuscarora and Stockbridge Indians adhered faithfully to the United States and assisted them with their warriors, . . . and as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them . . ."
(Here followed promises to erect a sawmill and other improvements on the Reservation and to

compensate the Oneidas for damages suffered in the War.)

34. To implement their treaty obligations to the Oneidas and other Indians, the United States enacted in 1790 what is now Section 177 of the Federal Indian Law, 25 USCA. The meaning of the protection promised in these treaties was explained by President George Washington to a delegation of Senecas on December 29, 1970. Interpreting the 1784 treaty he said: [67]

> "Here, then, is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.
>
> "Hear well and let it be heard by every person in your nation, that the President of the United States declares, that the General Government considers itself bound to protect you in all the lands secured to you by the treaty of Fort Stanwix, the 22d day of October, 1784, excepting such parts as you may since have fairly sold, to persons properly authorized to purchase of You."

Thus, the United States by formal treaties, the supreme law of the land, and George Washington, our first President, have given their sacred word and promise:

> "The General Government will never consent to your being defrauded, but it will protect you in all your just rights."

The plaintiffs herein claim the jurisdiction and protection of the Federal Court. The case most clearly turns on interpretation and implementation of the treaties and laws of the United States.

Affidavit of Jacob Thompson and George C. Shattuck, Filed 11-18-70.

The case most clearly involves Constitutional rights to due process and equal protection, which have long been denied to American Indians.

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SUMMARY

35. The Oneida Nation was in the way of America's expansion to the West. Unfortunately their Reservation was square across the gateway. The Oneidas were dispossessed by official act and policy of New York State. In truth, their property was condemned for public purpose, but without fair and adequate consideration. This is demonstrable from the very records of New York State. The property was also taken in contravention of specific federal law which is even now in effect.

The Oneidas have been denied property without due process of law, and the State has never granted them a forum where they could seek redress. What they want now is their day in court.

The United States in formal treaty has promised to help their former allies in time of need. "Great nations, like great men, should keep their word". The Oneidas believe that the United States, acting through its courts, should keep its word to them given by George Washington and in three formal treaties.

Respectfully,

s/ JACOB THOMPSON
Jacob Thompson, President,
ONEIDA INDIAN NATION OF
NEW YORK

s/ GEORGE C. SHATTUCK
George C. Shattuck, Attorney

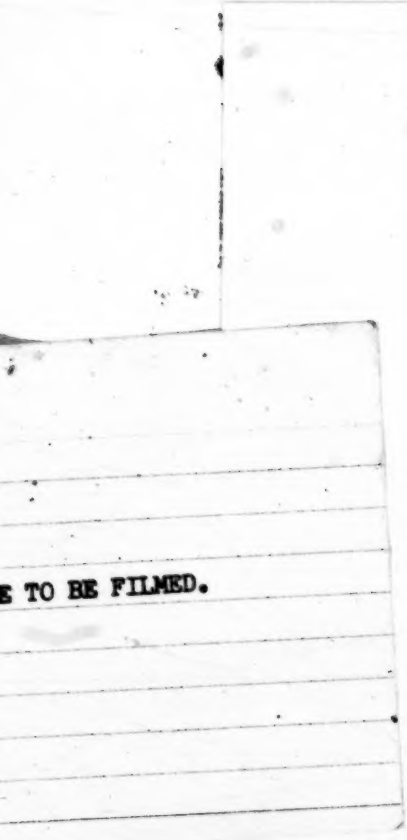
(Sworn to November 12, 1970).

Exhibit "I" — Map
annexed to Thompson and Shattuck Affidavit.

[69]

MAP IS TOO LARG

Exhibit "II" — Map
annexed to Thompson and Shattuck Affidavit.



AFFIDAVIT OF DELIA WATERMAN, Filed 11-18-70.

[70]

(SAME TITLE).

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

I, DELIA WATERMAN, being duly sworn, depose and say that:

1. I reside on the Oneida Indian Reservation in the City of Oneida, New York, located adjacent to the present route 46.

2. I am the hereditary clan mother of the Wolf Clan of the Oneida Indians of New York State, and I am 70 years of age.

3. Based on tradition and to a lesser extent on written material, handed down from generation to generation, I can state that the Oneida Indians have always asked to obtain justice from New York State in respect to the Reservation that was illegally acquired by the State.

4. Because of our poverty and because of legal technicalities which have barred us from State Courts, the Oneida Indians have never been able to assert our claims. The State has taken our land for an inadequate price and in violation of federal law; and to protect itself the State has ruled that an Indian Tribe cannot sue in its Courts. [71]

5. There has been no lack of diligence, legally termed "laches", on our part in asserting our rights. Rather, our small voice has been unheard for 150 years.

6. Since the State's laws and courts are inadequate to protect the rights of the Oneida Indians, we have no recourse but to appeal to federal courts and federal laws.

7. The currency and vitality of the federal laws and treaties in relation to the Oneida Indians is demonstrated

by the fact that each year we receive an allotment of "treaty cloth" pursuant to the Treaty of Canandaigua, also called the Six Nations Treaty, concluded in 1794. Attached as an exhibit to this affidavit is a piece of the "treaty cloth" recently received from the United States of America.

s/ DELIA WATERMAN

(Sworn to November 15, 1970).

CROSS-MOTION TO AMEND COMPLAINT, ETC., Filed 11-18-70.

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(SAME TITLE).

PLEASE TAKE NOTICE that on the 23rd day of November, 1970 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the plaintiffs in this action will move this Court at a Motion Term in the Federal Building in the City of Utica, New York, for an order permitting plaintiffs to amend their complaint herein to substitute a new paragraph 2 to read as follows:

> "2. The matter in controversy exceeds, exclusive of interests and costs, the sum of $10,000. Jurisdiction is conferred by diversity of citizenship and because this complaint presents a federal question involving the Constitution, Article I, Section 8, Clause 3, the Treaties, and the Laws of the United States, and plaintiffs claim relief under such Constitution, Treaties, and Laws. Jurisdiction is also claimed under Sections 1983 and 1984 of 42 USCA because plaintiffs have been and are being deprived of property without due process of law and without

equal protection of the law, in violation of their rights under the Constitution of the United States."

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This motion and plaintiffs' opposition to defendants' motion to dismiss is based on the following points, on the affidavit of George C. Shattuck, attached hereto, and on the affidavit of Delia Waterman and the joint affidavit of Jacob Thompson and George C. Shattuck filed herewith.

1. The complaint states allegations bringing the case into the jurisdiction of this Court under the federal question rule involving the Constitution, Treaties, and Laws of the United States. It also alleges that property was taken and continues to be withheld from plaintiffs without due process of law.

2. The defenses of laches, statute of limitations, and "purchases for value" are affirmative defenses which should be pleaded in defendants' answers. They are not relevant to whether the complaint states a cause of action.

3. Further, no concept of laches, statute of limitations, or "purchases for value" applies in this case, which is to be determined under the Federal Constitution, formal Treaties of the United States, and specific federal laws governing the rights of Indians.

4. The State's immunity from certain actions in federal courts does not apply to counties.

5. State laws requiring certain notice periods and places of trial do not apply in a federal court action involving the Constitution, Treaties, and Laws of the United States.

6. The fact that the defendant counties were not in existence in 1795 is not relevant, since they derived their title from the illegal and void State purchase of 1795.

7. The case before the Indian Claims Commission does not affect the rights of the parties herein. The Indian Claims Commission can grant damages for the wrongful acts of the United States, but it has no power to alter land rights guaranteed by Treaties and Laws of the United States.

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8. A suit against the State of New York is not available as a remedy for plaintiffs because such a suit cannot be maintained in either a State or a Federal Court; further, the consent of the United States would be required in any settlement or judgment respecting land titles. Section 177 of 25 USCA.

9. Defendant, Oneida County, contends that the Oneidas' title is not to a fee but only to a right of occupancy. Historically New York has claimed a "pre-emption right" to acquire Indian lands. Whatever the status of other Indian Tribes in this State, the Federal Treaties clearly guaranteed the Oneidas what amounts to an inalienable fee interest.

10. The plaintiffs herein have exhausted all remedies and made all administrative appeals before initiating this suit.

11. The complaint clearly states a cause of action for monetary relief requiring both factual determinations and interpretation of the United States Constitution, Treaties of the United States, Laws of the United States, and decisions of Federal Courts.

12. The defendants' motions should be dismissed; the plaintiffs' motion for leave to amend their complaint should

be granted; and the defendants should be required to plead affirmative defenses in their answers.

s/ GEORGE C. SHATTUCK
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AFFIDAVIT IN SUPPORT OF CROSS-MOTION AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS.

[76]

(SAME TITLE).

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

GEORGE C. SHATTUCK, being duly sworn, deposes and says that he is the attorney for plaintiffs in this action and that this affidavit is submitted in support of plaintiffs' motion for an amended complaint and in opposition to defendants' motion for judgment.

CONCERNING JURISDICTION

1. A. An amended complaint should be allowed herein because the facts alleged and the Federal Treaties and Laws invoked in the complaint present a federal question within the meaning of Section 1331 of 28 USCA. In this case are involved serious questions of public significance which require interpretation of the Constitution, Treaties, and Laws of the United States. The controversy here is real and substantive and vitally affects the interests of the parties.

Section 233 of 25 USCA indicates a specific intent that the Courts of New York State shall not have jurisdiction in civil cases involving Indian lands. This statute, effective September 13, 1952, conferred upon the Courts of New York State civil jurisdiction over cases where Indians were parties.

[77]

Before 1952 Indians could not sue or be sued in New York Courts. After conferring such jurisdiction, the statute states certain provisos which specifically retain to Federal Courts jurisdiction over Indian land, e.g.,

> "Provided further; That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable

the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

B. An amended complaint should be allowed herein because the facts alleged and Federal Treaties and Laws invoked in the complaint show that property has been taken, and continues to be withheld, from plaintiffs without due process of law. Because of their status as a minority race the plaintiffs have been denied equal protection of the laws of New York and of federal laws. The violation of plaintiffs' Constitutional rights has been a flagrant and long continued deprivation of their right to property which they own under the law of the United States. Sections 1983 and 1984 of 42 USCA confer jurisdiction in such case.

C. There is jurisdiction under the diversity of citizenship rules because the Oneida Tribe of Indians of Wisconsin, Inc. have a separate, distinct and severable interest from that of the Oneida Indians of New York. Over 100 years ago they became distinct and separate legal entities, located in different states, and supervised under different concepts of the federal laws in respect of Indians.

The Oneida Indians of New York should be named as proper parties herein because they have no remedy in the Courts of New York State. This point if clearly substantiated in the many jurisdictional and laches-type objections raised in the affidavits of defendants' counsel, Mr. Frye and Mr. Burke. This

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is not a case of improper joinder to obtain federal jurisdiction; as shown by defendants' own affidavits, the plaintiffs have no other choice, no other forum to have their rights adjudicated.

Affidavit in Support of Cross-Motion and in Opposition to Defendants' Motion to Dismiss.

CONCERNING THE POINTS
RAISED BY DEFENDANTS

2. A. Defendants have asserted certain affirmative defenses which raise questions of fact; such as alleged laches, periods of limitations, "purchases for value". Such affirmative defenses should be pleaded in defendants' answers and have no bearing on whether the allegations in the complaint state a cause of action.

B. The affidavits of Delia Waterman and of Jacob Thompson and George C. Shattuck, filed herewith, show why such defenses will be of no avail. A person who is under a disability to bring a suit cannot be said to have waived his rights. The Courts of New York State have consistently denied to Indian Nations or Tribes the right to initiate a lawsuit in their behalf. You cannot "sleep on a right" you don't possess. Until recently, Indians have been barred by federal law from all civil suits in state courts, c.f. Sec. 233 of 25 USCA.

C. Plaintiffs do not claim, in the case at bar, moneys or property due years ago. They claim the fair rental value for the period January 1, 1968 through December 31, 1969; a period of about two years prior to service of the complaint. Other cases may be brought for past or future damages but they are not before this Court.

D. This case is brought under federal law. As defendant's attorney, Richard A. Frye, points out in his affidavit ". . . there is no general federal statute of limitations . . .". Paragraph 11.

3. The defenses of the laches, periods of limitation, "purchases for value" type depend on state law concepts; again as Attorney Frye points out in his affidavit. These concepts just

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do not apply to Indian Reservations because of Section 177

of 25 USCA, which dates back to 1790. If state law cannot reach out to condemn Indian land for state purposes, Tuscarora Nation of Indians v. Power Authority, 257 F 2d 885 (2d Cir. 1958), it certainly cannot act as a shield to protect one who wrongfully takes such land.

4. A. Defendants apparently claim immunity from suit under the 11th Amendment to the U.S. Constitution, which bars suits against states by citizens. The states' immunity, however, does not apply to counties or other political subdivisions. The text, "The Constitution of the United States of America", 1964 Edition, prepared by the Library of Congress states:

> "Subsequent cases giving the - (11th) - amendment a restrictive effect are those holding that counties and municipalities are suable in the federal courts; and that government corporations of the state are not immune when suable under law which created them." p. 1046.

B. Defendants' affidavits state that there is no enabling act which permits this suit. There is no state enabling act and none is needed. This is a Federal Court and the enabling acts are:

(i) Section 1332 of 28 USCA
(ii) Section 1331 of 28 USCA
(iii) Sections 1983 and 1984 of 42 USCA.

5. A. the 90 day notice period and the one year period of limitations do not apply in federal courts. State laws cannot frustrate the federal Constitution, Treaties, and Laws. Tuscarora Nation of Ind. v. Power Authority, id.

B. Moreover, notice was given to defendants in this action. On January 29, 1970 a copy of the complaint herein was mailed to the County Attorney of each defendant with a letter stating that plaintiffs proposed to file the

complaint. This completely adequate notice was given just ten days before this action, based on a continued trespass, was commenced. [80]

6. The fact that defendant counties were not in existence in 1795 is immaterial here. The complaint, as amended, alleges damages from January 1, 1968 through December 31, 1969. Both defendants were in existence during such period.

7. The case before the Indian Claim Commission does not bar this claim. The Indian Claims Commission was created by Congress in 1946 to hear claims against the United States. Sec. 70a of 25 USCA. No decision of the Indian Claims Commission can change title to Indian Reservation land. Nor can it retroactively legalize a wrongful taking of land by granting damages in respect of the United States' part in the wrongful act.

8. The defendants' affidavits suggest that the proper remedy lies in a suit directly against New York State. As shown by plaintiffs' affidavits herein, such a suit is not possible without consent of the State.

9. A. The distinction between fee title, "right of occupancy", "aboriginal possession", and other concepts of property rights has no place in this suit. It is not relevant.

B. The nations which conquered and settled North America and the original Colonies never conceded that Indians had fee title. They had to take this position in order to justify their original settlement and conquest; and to some extent this position was taken in order to protect the Indians who had no conception of what the Europeans meant by written deeds and conveyances. The point, however, is that the Oneidas' ownership of their Reservation was formally agreed to by the State in the 1788 Treaty of

Fort Schuyler, see Exhibit A, and guaranteed by the Federal Treaties and Laws invoked in the complaint.

10. The plaintiffs, as alleged in the complaint, have exhausted all remedies known to them. The Oneidas petitioned for justice to:

- The Governor of New York State (as provided in the 1788 Treaty with the State) (1967)
- The New York State Constitutional Convention (1967)

[81]

- The President of the United States (as provided in the 1794 Treaty of Canandaigua) (1968)
- The Congress of the United States (1970).

As shown in the plaintiffs' affidavits filed herewith, the plaintiffs' efforts to get justice have been repeated over a long period of time. In all these cases no help was given to the Oneidas. The Petition to the President was denied, after conferences with the Department of Interior, because of a conflict of interest; if the U.S. helped the Oneidas, it might jeopardize its case in the Indian Claims Commission.

11. The complaint clearly states a cause of action for the relief demanded therein. The facts stated are true. The laws are clear. The treaties are the law of the land and contain covenants which should be kept. The relief sought is not drastic or unfair.

SUMMARY

The defendants motion should be dismissed and this case should proceed to trial on the amended complaint.

s/ GEORGE C. SHATTUCK

(Sworn to November 17, 1970).

Exhibit A — Treaty of 1788 attached to Supporting Affidavit.

AGREEMENT BETWEEN NEW YORK AND THE ONEIDA INDIANS CALLED A TREATY CONCLUDED AT FORT SCHUYLER IN 1788 (N. Y. Leg. Doc. No. 51, 1889, pp. 237-241).

At a treaty held at Fort Schuyler, formerly called Fort Stanwix, in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indians called the Oneidas—it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

First, The Oneidas do cede and grant all their lands to the people of the State of New York forever.

Secondly. Of the said ceded lands the following tract to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly bounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner of the last mentioned tract; thence due south until it intersects a due west line from the head of the Tianaderha or Unadilla River; thence from the said point of intercession due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Caneserage Creek, and thence along the said Creek the Oneida Lake and the Wood Creek to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved lands, and four miles distant from the said Southern line, the Oneidas shall hold to themselves and their posterity forever for their own use and cul-

Exhibit A - Treaty of 1788 attached to Supporting Affidavit.

tivation, but not to be sold, leased or in any other manner aliened or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their rights so to make leases and to prevent frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of the State of New York one half mile square at the distance of every six miles of the lands along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and the Oneida Lake as they shall elect and may take and appropriate for such works or buildings lands to the extent of one square mile at each place; and further notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indians (now settled at Brothertown under the pastoral care of the Rev. Samson Occom) and their posterity forever, and the Stockbridge indians and their posterity forever are to enjoy their

settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indians, and a tract of six miles square for the Stockbridge Indians.

Thirdly. In consideration of the said Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollars in provisions; and also five hundred dollars in money to be applied towards building a grist mill and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever on the first day of June in every year at Fort Schuyler aforesaid six hundred dollars in silver; but if the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollars shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid; and as a further consideration to the Oneidas the people of the State of New York shall grant to the said John Francis Perache a tract of land, Beginning in the line of property at a certain cedar tree near the road leading to Oneida and runs from the said cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache hath consented to accept from the Oneidas in satisfaction for an injury done to him by one of their Nation. And further, the lands intended by the Oneidas for John T. Kirkland and for George W. Kirkland, being now appropriated to the use of the Oneidas, the people

of the State of New York shall therefore, by a grant of other lands make compensation to the said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from the Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the said ceded lands lying to the northward of the Oneida Lake a tract of ten miles square, wherever he shall elect the same.

Fourthly. The people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, from residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation, and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said State for the time being. And further, the Oneidas and their posterity forever shall at the request of the Governor of the said State be aiding to the people of the State of New York in removing all such intruders, and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice.

In testimony thereof as well the sachems, chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation, as the said Governor and other commissioners of the People of the State of New York, have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

(The Indians all signed this instrument by making their mark, a cross, at the end of their names, which had been written for them.)

Exhibit A - Treaty of 1788 attached to Supporting Affidavit.

66a [86]

Witnesses present.

The words (and the Stockbridge indians and their posterity forever) after the third word in the last line of the second article, and also the words (for the New England Indians and a tract of six miles square for the Stockbridge Indians) at the end of the same line and also the words (two thousand dollars in money) in the first line of the third article, and the words (except the lands whereof the Oneidas may make leases as aforesaid) in the third line of the fourth article being first interlined.

Before the execution hereof the Oneidas in Public Council declared to the Commissioners that they had in return for his frequent good offices to them given to John I. Bleecker of the lands reserved for their own use, one mile Square adjoining to the lands of James Dean and requested that the same might be granted and confirmed to him by the State.

SAML. KIRKLAND,
Miss'y & Interpreter.

J. B. CHRS. DEST,
Trys.

ABM. ROSEKRANTZ,
SIMEON DEWITT,
Survr. Genl.,

SAMUEL LATHAM MITHCELL,
JOHN TAYLER,
WM. COLBRATH.

NOTICE OF MOTION AND MOTION TO DISMISS.

[88]

(SAME TITLE).

PLEASE TAKE NOTICE, that on the 23rd day of November, 1970, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, the County of Oneida, one of the defendants in this action, will move this Court at a motion term to be held at the Court Room in the Federal Building in the City of Utica, New York, for an order for summary judgment in favor of said defendant County of Oneida and against the plaintiffs, dismissing the complaint herein, together with the costs and disbursements incurred by said defendant in this action.

This motion is made upon the ground that there is no genuine issue as to any material fact and defendant County of Oneida is entitled to judgment as a matter of law on the following grounds:

1. The County of Oneida, as a political division of the State of New York, has not waived its immunity from suit;

2. There is no enabling act passed by the Legislature which permits this action to be maintained by the plaintiffs;

3. The plaintiffs have not complied with the requirements of the County Law and the General Municipal Law of the State of New York as to the requirements of giving notice of the claim and commencing an action thereon within one year and 90 days after the event upon which the claim is based;

[89]

4. It appears on the face of the plaintiffs' complaint that the claim asserted did not accrue, if, in fact, it accrued at all, to plaintiffs within three years before the filing of this action and consequently the action is barred by the statute of limitations;

5. The prolonged delay on the part of the plaintiffs in bringing the action has barred the suit under the defense of laches;

6. The Court does not have jurisdiction of the subject matter on the ground of diversity of citizenship as one of the parties plaintiff, namely the Oneida Indians of New York, are citizens of the same state as defendants.

7. The defendant County of Oneida has acquired title to the premises involved herein by adverse possession;

8. Defendant County of Oneida is a bona fide purchaser for value of said premises without notice of any adverse rights of others;

9. None of the acts set forth in the complaint that form the bases of the action were committed by defendant County of Oneida and accordingly, it is not a proper party to the action;

10. The plaintiffs did not own a fee title to the said premises as title was vested in the State of New York by virtue of its being the sovereign. The plaintiffs only had a right of occupancy and, therefore, the price paid under the treaty was adequate in the premises;

11. The plaintiffs have not exhausted their remedies under the treaty and the claim is still pending before the Federal Indian Claims Commission;

12. This motion is based on this notice and motion, the complaint filed herein with the attached exhibits, the affidavit of Richard A. Frye, Esq. attached hereto and the memorandum of points and authorities filed herewith.

Affidavit in Support of Motion for Summary Judgment.

Dated: November 5, 1970.

s/ RICHARD A. FRYE
Attorney for Defendant County
of Oneida
Office and Post Office Address
Oneida County Office Building
800 Park Avenue
Utica, New York 13501
Telephone (315) 798-5910

[90]

TO:

BOND, SCHOENECK & KING, ESQS.
Attorneys for Plaintiffs
Office and Post Office Address
1000 State Tower Building
Syracuse, New York 13202
Telephone (315) 422-0121

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

[91]

(SAME TITLE).

STATE OF NEW YORK)
County of Oneida) ss.:

RICHARD A. FRYE, being duly sworn, deposes and says:

1. He is the Oneida County Attorney and as such is familiar with the proceedings of this action. He makes this affidavit in support of a motion for summary judgment on the grounds set forth in the notice of motion and motion.

2. The action herein was commenced by the service of a summons and complaint upon defendant, County of

Oneida (hereinafter called the "County"), on or about the 9th day of February, 1970. Thereafter, on the 28th day of July, 1970, an amended complaint was served.

3. A number of extensions of time in which to answer have been granted by the attorney for the plaintiffs and, consequently, an answer has not as yet been interposed on behalf of the County and time to do so has not expired.

4. The complaint alleges that plaintiffs, by a treaty with the State of New York in 1788, ceded most of their lands in New York to the State with the exception of certain lands of about 300,000 acres which were reserved. It is further alleged that by a subsequent treaty in 1795, the plaintiffs then transferred a large part of the reserved lands to the State.

[92]

5. The gravamen of the complaint is that the transfer in 1795 was invalid because the treaty did not comply with federal statute (1 Stat 329, 1793) in that no federal consent was obtained and no United States Commissioner was present. The other main basis for the cause of action is that the agents of the State misrepresented the value of the land and induced the plaintiffs to sell for an inadequate price.

6. The County is brought into the action solely on the ground that it subsequently became the owner of portions of the lands deeded to the State in 1795. Plaintiffs demanded of the County the rental value of the said premises. It should be noted that the premises allegedly owned by the County are not specifically identified nor is any basis of value presented. It also appears at this state of the proceeding that the only lands owned by the County that are the subject of this action are public highways open for the use of people including plaintiffs and should not be subject to rent.

7. The County is immune from liability as a political

subdivision of the State of New York. Under Section 53 of the County Law of New York, each County in the State is liable for the torts of its officers, agents and employees under the same rules of law applicable to the State. Originally, under Common Law, the State, being sovereign, was immune from suit. Under Section 8 of the New York Court of Claims Act adopted in 1939, the State has generally waived that immunity and consented to have liability determined by the same rules of law applying to actions against individuals or corporations provided, however, that certain limitations in the article are met. However, the State has not wholly waived its immunity but only where an individual or corporation would be required to answer to an action for the same thing. The right to enter into a treaty with plaintiffs is an attribute that could only be possessed by a sovereign and not by an individual and, therefore, the waiver of immunity does not apply to this action. Since the County, under Section 53 of the County Law, is only liable under the same rules applicable to the State, it has not waived its immunity either.

[93]

8. The first State statute waiving immunity, even in a limited manner, was passed in 1929, more than 100 years after the acts that form the basis of the cause of action herein. Those said acts occurred, therefore, at a time when the State and its political sub-divisions were immune from suit. It cannot be said that the State has waived its Common Law immunity retroactively to that time.

9. No enabling act has been passed permitting the plaintiffs to maintain the suit, which act is necessary in the absence of any waiver of immunity.

10. Even if we are to assume that the State waived its immunity as to this cause of action, any such waiver is conditional upon certain requirements being met as to notice and filing claims. Under Section 52 of the County Law,

any claim against a County must be made and served in compliance with Section 50-e of the General Municipal Law of the State of New York which in turn requires that a notice of claim be given within 90 days after the claim arises. Section 52 also provides that every action on such claim must be commenced pursuant to Section 50-i of the General Municipal Law which in turn requires that the action be commenced within one year and 90 days after the happening of the event upon which the claim is based. Manifestly, none of these requirements have been met by the plaintiffs. In addition, Section 52 states that the place of trial shall be in the County against which the action is brought.

11. The cause of action herein is barred by the statute of limitations. Since there is no general federal statute of limitations, the Federal Courts have applied State Law as to the period of limitation. Under Section 214 (4) CPLR an action to recover damages for injury to real property must be commenced within three years after the cause of action accrued. Injury to property has been held to not necessarily mean a physical injury but includes any act in invasion of one's property rights and refers to an action grounded in tort. The cause of action herein accrued at the time of execu-

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tion of the treaty, long before commencement of the action.

12. Even if there were no applicable statutes of limitations, the plaintiffs' action would be barred on the ground of laches. The plaintiffs had knowledge of the existence of the facts that form the basis for the action at the time they occurred or might have acquainted themselves with them by the use of reasonable diligence shortly thereafter. It would be inequitable at this stage in history to allow them to assert alleged rights after a lapse of time so great that the County would be severely prejudiced by their neglect. The County having no knowledge that such alleged rights

would be asserted has acquired lands, and made improvements thereon on behalf of its citizens, title to which would be affected by this suit. Also, the County would be obviously prejudiced by a suit at this late date because of the loss of evidence and the unavailability of witnesses with personal knowledge of the treaty, the lands involved, the consideration paid and the circumstances surrounding the negotiations regarding the treaty.

13. The Court does not have jurisdiction of the action on the ground of diversity of citizenship as alleged in the complaint because the Oneida Indians of New York, one of the plaintiffs, are citizens of the State of New York by virtue of their residence here and, therefore, are citizens of the same State as the defendants. It has been held that complete diversity is required by the statute, that is, all of the plaintiffs must be citizens of a State or States different from any of the defendants, and common citizenship, as found here, destroys the diversity.

14. The lands that are the subject of the action have been held by the defendants and their predecessors in title for some 175 years in actual, open, hostile, notorious, continuous and exclusive possession under claim of right and, therefore, title has vested in defendants by adverse possession.

15. Any claim to said premises by the plaintiffs is void as against defendants who are bona fide purchasers who have acquired said lands in good faith, either by purchase or condemnation, and have paid a valuable [95]

consideration without notice of any adverse right of others.

16. The bases for the action are that the State of New York did not conform to Federal Law at the time it purchased the lands in question by treaty and that the State misrepresented the value of the said lands and was thus able to pay an inadequate price. There is no allegation

that the County was a party to the treaty or made any misrepresentations. As a matter of fact, the County of Oneida was not even in existence until 1798. The plaintiffs are attempting to have the County respond in money damages for the alleged wrongful acts of the State. Manifestly, the State of New York should be the defendant herein.

17. The price paid by the State for the land cannot be compared to the prices paid by settlers as evidence of fraud or misrepresentation. The Indians did not actually own the lands used by them. The title to all vacant and unappropriated lands within the thirteen original states was vested in each State. The Indians had only a right of occupancy subject to the superior title in fee of the sovereign. As an historical fact, they did not settle the land as we know it and claim or reduce any particular part of it to ownership. Since most of it was used sporadically for hunting and fishing, the value of it to them was not the same as the value to the settlers who intended to farm it and build on it. Therefore, the price paid by settlers and developers cannot be equated to the value of the land to the Indians evidenced by the price paid to them. Since the State was not paying for a fee title since it already had that as a sovereign but was only paying for possession and the acknowledgement of their superior title, the price was completely adequate.

18. The Complaint alleges that both Federal and State treaties provide that the Indians are to ask the help of the United States and the State before taking any action on their own. There is no allegation that the plaintiffs have exhausted such remedies. Upon information and belief, the contrary appears true as there is still a proceeding for redress pending before the Federal Indian Claims Commission.

[96]

19. Based on the foregoing, it is respectfully submitted that the Motion for Summary Judgment in favor of

defendant, County of Oneida, dismissing the plaintiffs' complaint, should be granted together with such other and further relief as to the Court may seem just and proper in the premises.

s/ RICHARD A. FRYE
Oneida County Attorney

(Sworn to November 5, 1970).

AFFIDAVIT OF JACOB THOMPSON.

[104]

(SAME TITLE).

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

JACOB THOMPSON, being duly sworn, deposes and says that:

1. I reside on the Onondaga Reservation at Nedrow, New York, and I am President of the Oneida Indian Nation of New York, one of the plaintiffs in the above action.

2. Based upon my extensive research into the history of the Oneida Indians and based upon the tradition that has been handed down from generation to generation, I can state that the Oneida Indians have been deprived and are being deprived of their legal rights, privileges and immunities as promised by the laws and treaties of the United States. The Oneida Indians have been deprived of their property by unjust acts of the State of New York and the laxity of the federal government in its guardianship of the Oneida Indians. The Oneida Indians, because of their status as a minority race or nation, have been deprived of capacity to bring action in the courts of New York State to redress their grievances.

Affidavit of Jacob Thompson.

3. In behalf of the Oneida Indians of New York, in my capacity as President thereof, I claim the protection and jurisdiction of this Court, pursuant to Section 1983 of 42 USCA which reads as follows:

[105]

"§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

s/ JACOB THOMPSON

(Sworn to November 18, 1970).

ORDER GRANTING LEAVE TO AMEND COMPLAINT, Filed 12-4-70.

[136]

(SAME TITLE).

This cause coming on to be heard upon the plaintiffs' motion for leave to file an amendment to their complaint herein and for an order that this cause be heard upon the plaintiffs' complaint as thus amended, and it appearing that justice requires that their motion be granted, and this Court being fully advised,

IT IS ORDERED, that the complaint herein be amended so that paragraph 2 thereof shall read as follows:

> "2. The matter in controversy exceeds, exclusive of interests and costs, the sum of $10,000. Jurisdiction is conferred by diversity of citizenship and because this complaint presents a federal question involving the Constitution, Article I, Section 8, Clause 3, the Treaties, and the Laws of the United States, and plaintiffs claim relief under such Constitution, Treaties, and Laws. Jurisdiction is also claimed under Sections 1983 and 1984 of 42 USCA 1343, because plaintiffs have been and are being deprived of property without due process of law and without equal protection of the law, in violation of their rights under the Constitution of the United States."

[137]

and it is further

ORDERED, that defendants' motion to dismiss the complaint be deemed made against the complaint as so amended.

Dated, December 2, 1970

s/ EDMUND PORT
United States District Judge

MEMORANDUM - DECISION AND ORDER OF JUDGE PORT, Filed 11-11-71.

[138]

(SAME TITLE).

APPEARANCES:

BOND, SCHOENECK & KING
Attorneys for Plaintiffs
1000 State Tower Building
Syracuse, New York 13202
GEORGE C. SHATTUCK, Esq.
Of Counsel

RICHARD A. FRYE, ESQ.
Attorney for Defendant County of Oneida
Oneida County Office Building
Utica, New York 13501

WILLIAM L. BURKE, ESQ.
Attorney for Defendant County of Madison
29 Lebanon Street
Hamilton, New York 13346

EDMUND PORT, Judge

Memorandum-Decision and Order

This case is before the court on motions made by the defendants for summary judgment dismissing the plaintiffs' complaint.

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Approximately ten different grounds are asserted. Since I have concluded that the complaint must be dismissed for lack of subject matter jurisdiction, it will not be necessary to consider the other grounds urged by the defendants for dismissal.

A brief statement of the procedural posture of the case will help bring the jurisdictional problem it presents into focus. The complaint was amended on two occasions: the first amendment, as of right,[1] added a second cause

of action. The second amendment resulted from the granting of plaintiffs' cross motion to amend and enlarge the jurisdictional allegations. The plaintiffs' original complaint based jurisdiction solely upon diversity of citizenship. Upon argument of defendants' motion for summary judgment dismissing the complaint, the plaintiffs were granted leave to amend the jurisdictional allegations of the complaint to read as follows:

> "2. The matter in controversy exceeds, exclusive of interests[sic] and costs, the sum of $10,000. Jurisdiction is conferred by diversity of citizenship and because this complaint presents a federal question involving the Constitution, Article I, Section 8, Clause 3, the Treaties, and Laws of the United States, and plaintiffs claim relief under such Constitution, Treaties, and Laws. Jurisdiction is also claimed under Sections 1983 and 1984 of 42 USCA, pursuant to 28 USCA 1343, because plaintiffs have been and are being deprived of property without due process of law and without equal protection of the law, in violation of their rights under the Constitution of the United States."

THE FACTS

The plaintiffs allege that in 1795, by a treaty negotiated

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between representatives of the plaintiffs and of the State of New York, 100,000 acres of land within the defendant counties, owned by the plaintiffs from time immemorial, was deeded to the State of New York. Plaintiffs allege that they were induced to sell the land by reason of fraud practiced on them by the State of New York. They further allege that the conveyance to the State of New York was violative of earlier treaty obligations of the United States and of the Indian Nonintercourse Act of 1790.[2]

Memorandum-Decision and Order of Judge Port, Filed 11-11-71.

The crux of plaintiffs' complaint is embodied in paragraph 22 of the first amended complaint, which reads as follows:

> 22. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements,[3] By reason of such use and occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least $10,000.00, exclusive of costs and interest.

No purpose would be served trying to tack a name on the cause of action asserted, since, except for the question of civil rights jurisdiction, the jurisdictional issues will be decided independently of the name given to the claim alleged.

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JURISDICTIONAL BASES

DIVERSITY OF CITIZENSHIP

Since there is no disputing the New York citizenship of the defendant counties,[4] the plaintiffs, in order to preserve the required complete diversity,[5] contend that plaintiff Oneida Indian Nation of New York State (Oneida Indians of New York) is not a citizen of New York State within the meaning of 28 U.S.C. §1332.[6]

In support of this claim, they analogize the Oneida Indians of New York, an unincorporated Indian tribe, to an unincorporated labor union, which they contend under the

holding of United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc.,[7] is not a "citizen" for diversity purposes. Plaintiffs' reading of this case is myopic. While an unincorporated association is not a citizen, per se, in the same sense as a corporation, the question considered and answered by the Court in the negative was "whether an unincorporated labor union is to be considered as a citizen for purposes of federal diversity jurisdiction, without regard to the citizenship of its members." [8]

Using the standard of the citizenship of its members to determine the citizenship of the tribe results in New York citizenship for diversity purposes. The individual members of the Oneida Indians of New York are citizens of the United States[9] domiciled in New York and are consequently citizens of New York State for diversity purposes.[10]

Recognizing that "diversity is broken"[11] if the analogy

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to an unincorporated labor union is carried to its logical conclusion because "some of the members of the Tribe are residents of New York * * *,"[12] plaintiffs carry the analogy only to that point at which the unincorporated association per se has no citizenship. They distinguish the Indian tribe from other unincorporated associations because the Indian tribe "has an independent sovereignty of its own"[13] and "is a nation within a nation"[14] with whom "[t]he United States for almost a century made formal treaties * * *."[15] This argument loses sight of the fact that for the last century, recognition has been denied to any Indian nation or tribe "as an independent nation, tribe, or power with whom the United States may contract by treaty."[16]

The plaintiff has not specifically asserted jurisdiction under 28 U.S.C. §1332(a)(2) or (a)(3).[17] However, even if its independent nation theory were urged as a ground for

asserting jurisdiction under these subdivisions, the argument would fail. Even before the Act of March 3, 1871, the Supreme Court had held that Indian nations or tribes are not foreign nations for federal jurisdictional purposes.[18]

FEDERAL QUESTION JURISDICTION

Federal question jurisdiction will be considered under 28 U.S.C. §§1331[19] and 1362.[20] No question has been raised as to the qualifications of the plaintiffs as Indian tribes "with a governing body duly recognized by the Secretary of the Interior * * *."[21] Nor is there any question that the amount in controversy exceeds $10,000.00. This leaves as the only open question whether

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"the matter in controversy arises under the Constitution, laws or treaties of the United States."[22]

Determining whether a complaint states a claim "arising under" the Constitution, treaties, or laws of the United States is usually not an easy undertaking. Despite the problems of construction posed by "arising under," the Court of Appeals for this circuit has distilled from a long line of cases criteria for "testing the complaint for sufficient assertion of a federal question * * *".[23]

> Whether the complaint is for a remedy expressly granted by an act of Congress or otherwise "inferred" from federal law, or whether a properly pleaded "state-created" claim itself presents a "pivotal question of federal law," for example because of an act of Congress must be construed or "federal common law govern[s] some disputed aspect" of the claim.[24]

In addition to this test, a number of general principles have become well established. The federal question must appear on the face of a well-pleaded complaint.[25] It is not enough that the allegations show the likelihood of a

question arising under federal law at some later juncture in the lawsuit.[26] Similarly, a case does not "arise under" federal law if the complaint merely anticipates a defense which involves federal law.[27] Nor does a suit "arise under a law renouncing a defense * * *."[28] A case "arises under" federal law when the well-pleaded complaint "discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of a law of Congress."[29]

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Shorn of all non-essential allegations, the complaint in this case is seeking damages for defendants' use and occupancy of land. This cause of action, regardless of the label it is given, is created under state law and requires only allegations of the plaintiffs' possessory rights and the defendants' interference therewith. None of these essential allegations calls into question the Constitution, treaties, or federal law.[30] The local property rights of numerous land owners within Madison and Oneida Counties, it seems to me, should be decided by the application of state law.[31]

Unlike a suit to remove a cloud on a title, the complaint in the present type of action need not allege the existence and invalidity of the instrument under which the defendant claims title.[32] It may well be that 25 U.S.C. §177 or the Treaty of 1795 could be called into question during the course of litigation, but such introduction would serve only to renounce a defense that title or right of possession to the land in question vested in New York State. The possible necessity of interpreting §177 or the Treaty in connection with a potential defense is insufficient to sustain federal question jurisdiction.[33]

Clearly, §177 does not create the remedy sought to be enforced in this lawsuit. The sole remedy of that section is a penalty provision in favor of the United States. Nor is this a case where the remedy sought may be inferred

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from federal law.[34] The complaint, stripped of all surplusage, does not present a "pivotal question of federal law."

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The complaint must also fall for failing to allege facts which give this court jurisdiction under the remaining part of the McFaddin test. While Title 25 of the United States Code, as well as other laws, the Constitution and treaties, evidences a concern for the protection of Indians,[35] there is little evidence that Congressional policy demands that this type of action be heard in a United States District Court. The action here calls for a state remedy granted, if at all, under state law, not under federal common law.

CIVIL RIGHTS JURISDICTION

That jursidiction does not lie under 28 U.S.C. §1343 and 42 U.S.C. §1983 requires little discussion. No matter how the plaintiffs attempt to dress it up, the complaint alleges "an action addressed solely to the taking of property"[36] which does not support jurisdiction under the quoted sections.[37] And if by some stretch of the imagination plaintiffs were to get over this hurdle, the fact that the Civil Rights Act does not apply to suits against municipalities would present an insurmountable barrier.[38]

For the reasons herein, it is

ORDERED, that the defendants' motion to dismiss the complaint be and the same hereby is granted for lack of subject matter jurisdiction.

s/ EDMUND PORT
United States District Judge

Dated: November 9, 1971
Auburn, New York

Memorandum-Decision and Order of Judge Port,
Filed 11-11-71.

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FOOTNOTES

[1] Fed. R. Civ. P. 15(a).

[2] 1 Stat. 137, now 25 U.S.C. §177 (1964).

[3] Since the treaty of 1795 dealt with 100,000 acres within the Counties of Oneida and Madison, and since the claim against the defendants relates only to "parts of said premises [currently occupied by defendants] for buildings, roads, and other public improvements," it is obvious that there are, of necessity, numerous other parties, occupying the balance of the 100,000 acre parcel under title derived from New York State, against whom like claims could be made.

[4] Cowles v. Mercer County, 74 U.S. 118 (1868); Brown v. Marshall County, Kentucky, 394 F.2d 498 (6th Cir. 1968).

[5] Strawbridge v. Curtiss, 7 U.S. 159 (1806).

[6] 28 U.S.C. §1332 (1964). This section reads, in pertinent part, as follows:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between--
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

[7] 382 U. S. 145 (1965).

[8] Id. at 147 (emphasis added).

9 8 U.S.C. §1401 (1964). See also U.S. Const., amend XIV, §1.

10 See U.S. Const., amend XIV, §1; Pemberton v. Colonna, 290 F.2d 220 (3rd Cir. 1961). See also Matter of Heff, 197 U.S. 488 (1905); Meeks v. McAdams, 390 F.2d 650 (10th Cir. 1968); Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965), cert denied 382 U.S. 986 (1966).

11 Plaintiffs' Brief on Issue of Jurisdiction, dated Dec. 18, 1970 at p. 6.

12 Id.

13 Id.

14 Id.

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15 Id.

16 25 U.S.C. §71 (1964), derived from Act of Mar. 3, 1871, C. 120, §1, 16 Stat. 566.

17 28 U.S.C. §§1332(a)(2), (a)(3) (1964). These subsections are set forth in note 6, supra.

18 Cherokee Nation v. State of Georgia, 30 U.S. 1 (1831).

19 28 U.S.C. §1331 (1964). This section, in pertinent part, reads as follows:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

[20] 28 U.S.C. §1362(added Pub. L. 89-635, §1, Oct. 10, 1966, 80 Stat. 880). This section provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

[21] Id.

[22] Id; 28 U.S.C. §1331 (1964).

[23] McFaddin Express, Incorporated v. Adley Corporation, 346 F.2d 424, 425 (1965), cert. denied 328 U.S. 1026 (1966).

[24] Id. at 426. See also Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968); T.B. Harms Company v. Eliscu, 339 F.2d 823 (2d Cir. 1964), cert. denied 381 U.S. 915 (1965).

[25] Tennessee v. Union and Planters' Bank, 152 U.S. 454 (1894).

[26] Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

[27] Id; Hopkins v. Walker, 244 U.S. 486 (1917).

[28] Gully v. First Nat. Bank, 299 U.S. 108, 116 (1936).

[29] Hopkins v. Walker, supra at 489.

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[30] See Taylor v. Anderson, 234 U.S. 74 (1914); Deere v. St. Lawrence River Power Co., 32 F.2d 550 (2d Cir. 1929).

[31] See note 3, supra.

[32] Compare Hopkins v. Walker, supra.

[33] See Gully v. First Nat. Bank, Supra.

[34] See Wheeldin v. Wheeler, 373 U.S. 647 (1963).

[35] Insofar as the plaintiffs may be entitled to redress against the United States, a claim is not pending before the Indian Claims Commission. See Exhibit, attached to Plaintiffs' Reply Brief on Issue of Jurisdiction; Defendant County of Oneida's Supplemental Brief, p. 5.

[36] Eisen v. Eastman, 421 F.2d 560, 564 (2d Cir. 1969), cert. denied 400 U.S. 841 (1970).

[37] Id.

[38] Monroe v. Pape, 365 U.S. 167 (1961). See also United States ex rel. Gittlemacker v. County of Philadelphia, 413 F.2d 84 (3rd Cir. 1969), cert. denied 396 U.S. 1046 (1970).

NOTICE OF APPEAL, Filed 11-26-71.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and the ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC., Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK, Defendants.

Civil Action No. 70-CV-35

Notice is hereby given that THE ONEIDA INDIAN NATION OF NEW YORK STATE and the ONEIDA INDIAN NATION OF WISCONSIN, the plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the order and judgment granting defendants' motion to dismiss entered in this action on the 11th day of November, 1971.

November 22, 1971.

s/ GEORGE C. SHATTUCK
George C. Shattuck, Partner
BOND, SCHOENECK & KING
Attorneys for Plaintiffs
Office and P.O. Address
1000 State Tower Building
Syracuse, New York 13202
Telephone [315] 422-0121

Notice of Appeal, Filed 11-26-71.

TO:

RICHARD A. FRYE, ESQ.
Attorney for Defendant County of Oneida
Oneida County Office Building
Utica, New York 13501

WILLIAM L. BURKE, ESQ.
Attorney for Defendant County of Madison
29 Lebanon Street
Hamilton, New York 13346

NOTICE OF MOTION AND MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS.

[151]

(SAME TITLE).

PLEASE TAKE NOTICE that on December 14, 1971, at 9:30 A.M., or as soon thereafter as counsel can be heard, THE ONEIDA INDIAN NATION OF NEW YORK STATE and THE ONEIDA INDIAN NATION OF WISCONSIN, plaintiffs, will move the Court, pursuant to 28 U.S.C. §1915, at the United States Court House, Syracuse, New York, as follows:

For an order allowing them to prosecute an appeal from the judgment in this action entered on November 11, 1971 without prepayment of costs or fees or the giving of security therefor and for an order requiring the United States to pay for the expense of supplying all designated original papers and a transcript of all designated portions of the evidence and proceedings.

This motion is based on the attached affidavit of Jacob Thompson, President of the Oneida Indians of New York.

Dated: November 30, 1971

s/ GEORGE C. SHATTUCK
George C. Shattuck, Partner
BOND, SCHOENECK & KING
Attorneys for Plaintiffs
1000 State Tower Building
Syracuse, New York 13202
Telephone [315] 422-0121

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS.

[152]

(SAME TITLE).

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

JACOB THOMPSON, being duly sworn, deposes and says:

1. I am the President of the Oneida Indians of New York, one of the plaintiffs in this action.

2. The plaintiffs in this action believe it to be in their interests to take an appeal from the judgment dismissing the complaint in this action entered on November 11, 1971 and tender herewith a copy of the notice of appeal. Such notice was filed and served by mail on November 26, 1971.

3. I believe that the plaintiffs are entitled to a reversal of the judgment on the following grounds:

A. The plaintiffs' complaint was dismissed on the grounds that the Court lacks jurisdiction under 28 U.S.C. §§1331, 1343, and 1362. This is the issue which will be appealed.

B. I have reviewed material submitted by our counsel on the legislative history of 28 U.S.C. §1362, and I believe that this indicates a clear Congressional intent that there be jurisdiction in a case like ours, where the United States refuses to commence the action in the Indians' behalf. The corespondence with the United States Department of The Interior, annexed as Exhibits A, B, and C hereto, shows clearly that the

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United States refuses to assist the Oneida Indians because of an alleged conflict of interest.

C. I believe our case has great merit because Indians are barred from the courts of New York State in such

claims and because of precedent in other federal court cases, including the decision of the Second Circuit Court of Appeals in the Tuscarora case cited in the plaintiffs' briefs.

D. As further evidence of the good faith and the substantial nature of this appeal, I attach as Exhibit D a copy of an inter-office memorandum to Arthur Gajarsa, Assistant to the Commissioner of Indian Affairs. This memo states in part;

> "However, assuming that damages of $10,000 or more are sought, it seems fairly clear that the interpretation of 25 USCA 177 is involved and this should be sufficient for the court to retain jurisdiction."

4. The plaintiffs are unable to pay the court fees and other costs, or the expenses connected with the preparation of the record on appeal necessary to prosecute the appeal. Plaintiffs are unable to give security for court costs and fees. The Oneida Indians of New York currently have the sum of $18.00 in their treasury and an income of $75 per year for a power pole easement over our remaining land in Oneida County. We expect to receive a settlement from the Consolidated Gas Supply Corp. for damage to said land but the disposition of this case is currently entangled in the bureaucracy of the Bureau of Indian Affairs. A pending settlement of a claim against the United States will be distributed to individual Indians and will not be an asset of the tribe as such. In short the Oneida Indians of New York lack sufficient funds to prosecute the appeal in this case.

5. I have talked by telephone with a representative of the Oneida Indians of Wisconsin, Inc, the other plaintiff, concerning their financial affairs. It is reported to me that they, as a tribe, are in a like financial situation.

Affidavit in Support of Motion for Leave to Appeal in Forma Pauperis.

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For the foregoing reasons, I respectfully request that the motion herein be granted and that the plaintiffs be allowed to appeal in forma pauperis.

s/ JACOB THOMPSON
Jacob Thompson, President
Oneida Indians of New York

(Sworn to December 2, 1971).

10

Exhibit A — Letter, dated 3-5-71 annexed to Supporting Affidavit.

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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR 5 - 1971

Dear Mr Shattuck:

Your January 18, 1971, letter correctly states the situation in which the Federal Government finds itself with respect to the Oneida claims against the State of New York. The Oneidas currently have pending claims against the United States which are based on the transactions on which the Oneidas wish to sue the State of New York; therefore the Government is not able to drop its defense and sue New York on behalf of the Indians.

We know of no authority for the United States to employ special counsel to represent the Oneida Indians in this matter. In this connection see 5 U.S.C. 3109 (Supp. V 1965). As you may know, there was introduced by the Administration in the last Congress a bill to provide for an Indian Trust Counsel Authority. Under this proposed legislation legal services in connection with Indian lands, water, and other natural resources would be provided Indians by the Federal Government independent of this Department and the Department of Justice. Such proposed legislation has been reintroduced in the present Congress and when enacted may provide the Oneidas an opportunity to obtain services such as you mention.

Sincerely yours,

Harrison Loesch

Assistant Secretary of the Interior

Mr. George C. Shattuck
Bond, Schoeneck & King
1000 State Tower Building
Syracuse, New York 13202

Exhibit B — Letter, dated 1-18-71 annexed to Supporting Affidavit.

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January 18, 1971

United States
Department of the Interior
Office of the Secretary
Washington, D. C. 20240

Attention: Mr. Harrison Loesch
Assistant Secretary

Re: Oneida Indians

Dear Mr. Loesch:

I received your letter of January 11 concerning a meeting on the Oneida Indians' problems. I think your letter and other recent correspondence clarifies something that has puzzled Mr. Thompson and us for some time.

As I now understand it, the Bureau of Indian Affairs and the Department of the Interior believe they cannot represent the Oneidas in the suit against New York because of a conflict of interest in respect of the claim against the United States before the Indian Claims Commission. This was never made clear to us before and of course your position is understandable.

Is there any way in which the United States could hire special counsel to represent its interest as guardian of the Oneida Indians?

Sincerely yours,

BOND, SCHOENECK & KING

CCS/b

By

Exhibit C — Letter, dated 1-11-71 annexed to Supporting Affidavit.

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UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 11 1971

Dear Mr. Shattuck:

Since Mr. Thompson wrote you on November 12, 1970, concerning your request for a meeting in reference to the Oneida Indian problems, we have undertaken to see whether there have been any changes in the status of the Oneida claims which would make possible the action requested by your clients. As we understand the Oneida claims are still pending before the Indian Claims Commission, it does not look as though we can take such action. If, nevertheless, you and your clients wish to discuss the situation with me, please let me know.

Sincerely yours,

Harrison Loesch

Assistant Secretary of the Interior

Mr. George C. Shattuck
Bond, Schoeneck and King
1000 State Tower Building
Syracuse, New York 13202

Exhibit D — Memorandum annexed to Supporting Affidavit.

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

IN REPLY REFER TO:

Memorandum

To: Arthur J. Gajarsa, Assistant to the Commissioner

From: Albert E. Kane, Program Adviser

Subject: Case of Oneida Indian Nation v. County of Oneida pending in New York Federal Court

You have asked the sole question of whether the plaintiff, Oneida Indian Nation, has any standing to sue in the United States District Court for the Northern District of New York. My reply is in the affirmative.

Whether the Federal Court can retain jurisdiction depends on the allegations in the complaint which is not before us and which we are unable to obtain. Consequently, we can only hazard a guess. However, assuming that damages of $10,000 or more are sought, it seems fairly clear that the interpretation of 25 USCA 177 is involved and this should be sufficient for the court to retain jurisdiction. As was said in Shelby County, Tennessee v. Fairway Homes, Inc., 285 F2d 617:

> "It is well settled that a case may be said to arise under the Constitution or laws of the United States whenever its correct decision depends upon the construction of either, or when the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction."

In Zwickler v. Koota, 389 U.S. 241 (1967), the court also declared:

> "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims.... wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum....Though never interpreted by a state

Exhibit D – Memorandum annexed to Supporting Affidavit.

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> court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit."

The gravamen of the complaint apparently is that through various treaties with the Indians, the United States obligated itself to protect and secure the Oneida lands in New York State and that it did not do so when the Oneidas were allowed to sell their lands to New York State without receiving adequate compensation therefor. The Indian Claims Commission decided (and its decision was affirmed by the Court of Claims) that the treaties vested no fiduciary responsibility in the United States but that 25 USCA 177 forbade the sale of Indian lands without the consent of the United States Government and thus the Government was required to protect the Indians against unfair treatment. However, there was not decided the question of whether this responsibility extended to transactions between New York State and its Indians. This question is now pending before the Indian Claims Commission where the Government has denied liability and its defense is being conducted by the Department of Justice. The Solicitor has declared that it would be inappropriate for the Government now to appear in another forum, whether a Federal or state court, to take the opposite view and support the claims of the Oneidas. (See memorandum of February 21, 1968, by Associate Solicitor of Indian Affairs to Assistant Secretary, Public Land Management, File No. E-67-1087.9a).

Many defenses to the claims of the Indians have been set forth and these have not been considered or passed upon as not being the subject of your inquiry.

Albert E. Kane
Program Adviser

DEFENDANTS' OPPOSITION TO THE PLAINTIFFS' MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS, Filed 12-13-71.

(SAME TITLE). [161]

Defendant County of Oneida herewith opposes plaintiffs' motion for leave to appeal in Forma Pauperis set for hearing on December 14, 1971, at 9:30 A. M., at the United States Court House, Syracuse, New York, on the following grounds and relying on the following authorities:

THE AFFIDAVIT SUPPORTING THE APPLICATION MUST BE MADE NOT ONLY BY THE APPELLANTS, BUT BY EVERY PERSON HAVING A DIRECT INTEREST IN THE RECOVERY.

The Oneida Indian Nation of New York State is an unincorporated Indian tribe made up of individual members who are domiciled in the State of New York. Any recovery in this action would have to be distributed to the individual members of the tribe and would not be an asset of the tribe as such. It has been held that where a plaintiff is suing in a representative capacity, it must also appear that the beneficiaries in whose interest the suit was maintained were also unable to pay the required costs. Clay vs. Southern Railway Company., 90 F 472.

In Chetkovich vs. United States, 47 F 2d 894, it was held

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that in an application for relief to appeal in Forma Pauperis, an affidavit supporting the application had to be made by every person interested in the recovery.

In a suit by a widow as administratrix of the estate of her deceased husband, under a state statute awarding damages to the widow and to the children, it was

held that in an application for leave to appeal in Forma Pauperis, an affidavit had to show the inability of the children as well as the widow to pay costs. Reed vs. Pennsylvania Company, 111 F 714.

In construing a similar statute in New York State, the courts have held that where an applicant is one of many plaintiffs, then a motion for leave to appeal as a poor person will be denied in the absence of a showing that all of the plaintiffs are poor persons. Orlowski vs. St. Stanislaus Roman Catholic Church, 12 NYS 2d 350.

In plaintiffs' affidavit in support of motion, at paragraph 4 thereof, the plaintiffs set forth merely a cursory exposition of the financial affairs of the Oneida Indians of New York and gave no details at all as to the financial condition of the Oneida Indians of Wisconsin.

For the reasons set forth above, the plaintiffs' motion for leave to appeal in Forma Pauperis should be denied.

Dated: December 10, 1971.

s/ JOSEPH A. MARKASON
Special Assistant County Attorney
County of Oneida, Defendant
Office and Post Office Address
Oneida County Office Building
800 Park Avenue
Utica, New York 13501
Telephone No. 315-798-5910

TO:

BOND, SCHOENECK & KING, ESQS.
George C. Shattuck, Partner
Attorneys for Plaintiffs
1000 State Tower Building
Syracuse, New York 13202
Telephone (315) 422-0121

ORDER OF JUDGE PORT, Filed 12-28-71.

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(SAME TITLE).

Upon consideration of the plaintiffs' motion, and accompanying affidavit, for leave to prosecute their appeal in forma pauperis, it is

ORDERED, that said motion be and the same hereby is denied except that the bond on appeal is hereby dispensed.

Dated: December 20, 1971.

s/ EDMUND PORT
United States District Court Judge

Copy of Decision of Second Circuit Court of Appeals.

The decision of the Second Circuit Court of Appeals and the denial of petitioners' motion for rehearing appear in the Petition for Certiorari filed herein at pages 14 and 30, respectively.

Date of Grant of Writ.

On June 4, 1973, the Supreme Court of the United States took the following action herein: "The petition for a writ of certiorari is granted."
